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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of NRC Investigation

Re: Subpoenas served upon Henry Allen, Diane Marrone and Susan Settino, Respondents

Case No. 1-92-037R

MOTION TO QUASH OR LIMIT SUBPOENA AND FOR EXPEDITED CONSIDERATION

Background: By order of the Director, Office of Investigations, subpoenas have been served upon Henry Allen, Diane Marrone and Susan Settino, requiring that they appear on March 31, 1994, "to testify in the matter of potential violations of NRC Regulations including, but not limited to, 10 CFR 50.5, 10 CFR 21.41, and CFR 50.9 relating to activities at Five Star Products, Inc."[1]

The three respondents are employees of Five Star Products, Inc. or Construction Products Research, Inc. Investigators of the NRC have previously served subpoenas duces tecum upon Five Star Products, Inc. and Construction Products Research, Inc., requiring the production of documents by that firm. Those subpoenas have been the subject of a Motion to Quash or Modify Subpoena by the corporations on the grounds that the Commission lacks jurisdiction over Five Star and Construction Products, that the Commission should not investigate the same matter that is the subject of a pending proceeding before the Department of Labor, and that the subpoenas issued to the companies should be modified so as not to require the production of documents already in the Commission's possession. A copy of that

[1]Copies of the subpoenas are attached hereto. Pursuant to agreement, those subpoenas have been served by mail upon counsel for the witnesses and no claim is raised concerning form or sufficiency of service.

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Motion to Quash, with its attachments, is attached hereto and incorporated herein. The respondents herein adopt and advance the arguments set forth in that Motion to Quash.

The Commission has declined to quash the subpoenas issued to Five Star and Construction Products; the companies, which apparently seek judicial review of the Commission's determination in the District Court, have declined to comply with the subpoena. The Commission has not yet sought to bring an enforcement action in the District Court, and so at the time this Motion to Quash is filed, no judicial determination as to the validity of the subpoenas has been made.

In addition to the arguments advanced in the attached Motion to Quash, the respondents make the further arguments:

The subpoenas have been issued in order to obtain testimony concerning three sections of the NRC Regulations. One section, 10 C.F.R. §21.41 does not apply to suppliers of commercial grade items. Section 21.41 regulates the conduct of "[e]ach individual, corporation, partnership or other entity subject to the regulations in this part .... " Section 21.2(d) strongly suggests that suppliers of commercial grade items, as those items are defined in §21.3(a-1), are not encompassed subject to the regulations of part 21 of 10 C.F.R. The companies have argued that they are not encompassed within such regulations and the respondents concur.

Similarly, 10 C.F.R. §50.9 does not apply to the companies which employ the respondents. Section 50.9 governs information required by an "applicant for a license" or a "licensee" -- neither Five Star not Construction Products falls within those categories. The section also contains a residual category of information "required by statute or the

Commission's regulations" and the respondents assert (without knowing which particular statutory or regulatory provision that the Commission may rely upon) that the companies which employ the respondents fall outside the scope of this residual category as well.

Finally, 10 C.F.R. §50.5 does refer to "supplier[s]." We believe, however, that this section must be read in pari materia with the other sections of 10 C.F.R. and does not refer to suppliers who would not be encompassed within the requirements of part 21. Otherwise, the inclusion of §21.2(d) would be mere surplusage. Moreover, the reference in §50.5 to "deliberate misconduct," in conjunction with the factual materials set forth in the attached Motion to Quash at 12 (indicating that the matter may have already been referred to the Justice Department) creates a justifiable concern that civil discovery processes are being used in order to obtain information for the purposes of a criminal proceeding.

For the reasons expressed in this Motion to Quash or Limit Subpoena and in the Motion to Quash filed by the companies, the respondents respectfully request pursuant to 10 C.F.R. §2.720(f) that the Commission:

(a) Quash the subpoenas served upon the respondents;

(b) Modify the subpoena so as not to require testimony as to any matter that is not relevant to the matter in issue and so as not to require testimony as to any matter that is privileged; or

(c) Condition denial of this motion on just and reasonable terms, and in terms specific enough to permit a thorough and complete judicial review of the Commission's determination, should such review become necessary.

Respectfully submitted,

JEREMIAH DONOVAN
123 Elm Street--Unit 400
P.O. Box 554
Old Saybrook, CT 06475
(203) 388-3750
Juris no. 305346
Fed.bar.no. CT 03536

CERTIFICATION

This is to certify that a copy of the above and foregoing on this March 25, 1994 was mailed via express mail to Ben B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, Washington, D.C. 20555.

JEREMIAH DONOVAN

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION
OFFICE OF INVESTIGATIONS

IN THE MATTER OF: NRC Investigation CASE NO. 1-92-037R

TO: Henry Allen

YOU ARE HEREBY COMMANDED, pursuant to Section 161 (c) of the Atomic Energy Act of 1954, as amended, to appear at the Marriott Hotel, 180 Hawley Lane, Trumbull, CT 06611 on the 31st day of March, 1994, at 2 p.m. to testify in the matter of potential violations of NRC Regulations including, but not limited to, 10 CFR 50.5, 10 CFR 21.41, and CFR 50.9 relating to activities at Five Star Products, Inc.

BY ORDER OF THE DIRECTOR,
OFFICE OF INVESTIGATIONS

By /s/ Ben B. Hayes
Ben B. Hayes

Date 3-9-94

Requested by: Jeffrey A. Teator, Investigator
Office of Investigations
475 Allendale Road
King of Prussia, PA 19406
Phone: (215) 337-5305

On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the Commission may (1) quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion on just and reasonable terms. Such motion should be directed to the Secretary of the Commission, Washington, DC 20555. Failure to comply with the terms of this subpoena may result in the Commission's seeking judicial enforcement of the subpoena pursuant to Section 233 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2281.

RETURN

CERTIFICATE OF PERSONAL SERVICE:

I certify that I delivered a copy of this subpoena in hand to:

_____

_____

on _____, 19 ____, at _____ o'clock _____ M., at _____

_____

_____

CERTIFICATE OF SERVICE BY MAIL:

I certify that I caused a copy of this subpoena to be mailed by Certified _____ mail, postage prepaid, to the address specified and with delivery restricted to the person named thereon on March 11, 19 94. Receipt No. P424745-276

Joyce E. Weddle
(Signature)

Joyce E. Weddle
Secretary, OI
(Printed Name and Title)
Office of Investigations
U.S. Nuclear Regulatory Commission

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION
OFFICE OF INVESTIGATIONS

IN THE MATTER OF: NRC Investigation CASE NO. 1-92-037R

TO: Diane Marrone

YOU ARE HEREBY COMMANDED, pursuant to Section 161 (c) of the Atomic Energy Act of 1954, as amended, to appear at the Marriott Hotel, 180 Hawley Lane, Trumbull, CT 06611 on the 31st day of March, 1994, at 10:30 a.m. to testify in the matter of potential violations of NRC Regulations including, but not limited to, 10 CFR 50.5, 10 CFR 21.41, and CFR 50.9 relating to activities at Five Star Products, Inc.

BY ORDER OF THE DIRECTOR,
OFFICE OF INVESTIGATIONS

By Ben B. Hayes
Ben B. Hayes

Date 3-9-94

Requested by: Jeffrey A. Teator, Investigator
Office of Investigations
475 Allendale Road
King of Prussia, PA 19406
Phone: (215) 337-5305

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_____ _____

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on _____, 19 ____, at _____ o'clock _____ M., at _____

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CERTIFICATE OF SERVICE BY MAIL:

I certify that I caused a copy of this subpoena to be mailed by Certified _____

_____ mail, postage prepaid, to the address specified and with delivery restricted to the person named thereon on March 11, 19 94, Receipt No. P 424 745 276.

Joyce E. Weddle
(Signature)

Joyce E. Weddle
Secretary, OI
(Printed Name and Title)
Office of Investigations
U.S. Nuclear Regulatory Commission

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION
OFFICE OF INVESTIGATIONS

IN THE MATTER OF: NRC Investigation **CASE NO.** 1-92-037R

TO: Susan Settino

YOU ARE HEREBY COMMANDED, pursuant to Section 161 (c) of the Atomic Energy Act of 1954, as amended, to appear at the Marriott Hotel, 180 Hawley Lane, Trumbull, CT 06611 on the 31st day of March, 1994, at 9 a.m. to testify in the matter of potential violations of NRC Regulations including, but not limited to, 10 CFR 50.5, 10 CFR 21.41, and CFR 50.9 relating to activities at Five Star Products, Inc.

BY ORDER OF THE DIRECTOR,
OFFICE OF INVESTIGATIONS

By _____
Ben B. Hayes

Date 3-9-94

Requested by: Jeffrey A. Teator, Investigator
Office of Investigations
475 Allendale Road
King of Prussia, PA 19406
Phone: (215) 337-5305

--

On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the Commission may (1) quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion on just and reasonable terms. Such motion should be directed to the Secretary of the Commission, Washington, DC 20555. Failure to comply with the terms of this subpoena may result in the Commission's seeking judicial enforcement of the subpoena pursuant to Section 233 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2281.

RETURN

CERTIFICATE OF PERSONAL SERVICE:

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on _____, 19 ____, at _____ o'clock _____ M., at _____

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Joyce E. Weddle
(Signature)

Joyce E. Weddle
Secretary, OI
(Printed Name and Title)
Office of Investigations
U.S. Nuclear Regulatory Commission

8/26

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of CONSTRUCTION PRODUCTS RESEARCH, INC., Respondent.	No. 1-93-027R

MOTION TO QUASH OR MODIFY SUBPOENA
AND FOR EXPEDITED CONSIDERATION

Summary

"Neither CPR nor Five Star is, nor has either ever been, a contractor or a subcontractor of a NRC licensee or permittee, or an applicant for such a license or permit, as I understand the regulations of the NRC. Five Star's relationship with such licensees or permittees is as a supplier only." -- William N. Babcock, President of Five Star Products, Inc. and Vice President of Construction Products Research, Inc. (Affidavit attached to Exhibit E).

Respondent Construction Products Research, Inc. ("CPR"), Five Star Products, Inc. ("Five Star")(a related company to CPR), and Messrs. H. Nash Babcock and William N. Babcock individually, (collectively "Movants") hereby move to quash the subpoena duces tecum served on William N. Babcock on August 19, 1993 (Exhibit A), for want of jurisdiction. In any event, the subpoena is overbroad, and would have to be modified, even if the Commission were to continue to assert jurisdiction over objection. Because the subpoena purports to require compliance on Thursday, September 2, 1993, the matter requires expedited consideration.

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First, under the Energy Reorganization Act of 1974 and the Commission's own regulations, the Commission is without jurisdiction over the employment practices of CPR, H. Nash Babcock, and William N. Babcock, for a simple reason -- they are not licensees, applicants for licenses, or contractors or subcontractors to a licensee or applicant. Five Star is a supplier of commercial cement and grout, and CPR tests these products (July 23, 1993 Letter, and attached Affidavit of William N. Babcock). This Commission does not regulate such entities. 10 C.F.R. § 21.7 (1993). Second, if the Commission nevertheless asserts jurisdiction, enforcement of this subpoena would unduly interfere with the ongoing investigation of the Department of Labor, the agency assigned to investigate employment matters over those who are within the Commission's jurisdiction (10 C.F.R. § 50.7 (1993)). Third, should the motion to quash the subpoena nevertheless be denied, the subpoena must be modified so that Mr. Babcock will not be required to produce records which are already in the possession of the Commission or are privileged.

Frankly, and with respect, this entire matter is an extraordinary example of regulatory excess. No one has alleged, let alone identified, any problem relating to Five Star's products at a nuclear facility. Mr. Holub's baseless concerns relate solely to the alleged inadequacy of a piece of laboratory equipment at CPR, and not to any defect at a nuclear facility. This investigation arose solely because Mr. Holub, a disgruntled and inferior former employee of CPR, telephoned the Commission's "800" number after a dispute with his employer over that

equipment. If an employee of Ace Hardware or IBM did so, presumably the Commission would not assert jurisdiction over Ace Hardware's or IBM's employment practices, even if Ace Hardware or IBM supplied products to nuclear plants. Yet, the Commission has pursued this matter, without jurisdiction, in identical circumstances. The Commission must terminate this investigation into the employment practices of entities not within its jurisdiction.

Five Star and CPR are related but small companies, founded by Mr. H. Nash Babcock. Mr. William Babcock is President of Five Star and Vice President of CPR. They have spent substantial amounts in legal fees to defend themselves and their companies in this matter, yet the matter should not even have begun. While the Commission may not want to admit that its jurisdiction is limited, it must. Because Movants are not within the Commission's jurisdiction, it should spare them the additional expense of pursuing this matter, particularly because it simply encourages other disgruntled employees to make baseless allegations. The Commission's own Inspector General just recently referred to such concerns on the part of the Commission's Staff, and this matter validates those concerns.

Introduction

On August 17, 1993, the Commission's Office of Investigations issued a subpoena addressed to "William N. Babcock or Custodian of Records" for Five Star and CPR. The subpoena was served on August 19, 1993, and is returnable on September 2, 1993. By its terms, the subpoena was issued solely for the

purpose of investigating the termination of employment of Mr. Edward P. Holub by CPR. Mr. Holub asserts that he was terminated by CPR as a result of his contact with the Commission; CPR denies this allegation. This same matter is the subject of a proceeding before the Department of Labor.

Under § 2.720(f) of the Commission's Rules of Practice, 10 C.F.R. § 2.720(f) (1993), the Commission may quash a subpoena that is unreasonable. For the reasons stated in this Motion, the subpoena is improper and unreasonable and should be quashed. In the event that the subpoena is not quashed, it must be modified in the manner set forth herein.

Argument

I.

THE COMMISSION LACKS JURISDICTION OVER FIVE STAR, CPR AND THE BABCOCKS.

Under Section 161(c) of the Atomic Energy Act of 1954 as amended, 42 U.S.C. § 2201(c), the Commission is authorized to conduct such investigations as it may deem proper to assist it in exercising the authority provided in the Act. Accordingly, the Commission's authority is limited. It is a bedrock principle of administrative law that the authority of an agency does not, and may not, exceed Congressional authorization. Stark v. Wickard, 321 U.S. 288 (1944).[1] The Administrative Procedure Act, 5 U.S.C.

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[1] See also Serr v. Sullivan, 270 F. Supp. 544, 546 (E.D. Pa. 1967), aff'd, 390 F.2d 619 (3d Cir. 1968):

> "We conclude that before an agency may undertake an investigation aided by the subpoena power it must have Congressional authorization. Finding no such power within the provisions of the relevant statute, either

(continued...)

§ 551, et seq., provides that an agency may not engage in any "investigative act . . . except as authorized by law", 5 U.S.C. § 555(c), and the Supreme Court has held that a threshold inquiry into the propriety of an agency subpoena is whether the agency is conducting a lawful investigation.[2]

The Commission's Director of Enforcement, Mr. James Lieberman, claimed that the Commission has jurisdiction over Five Star predicated on the fact that ". . . products which were tested by CPR for Five Star and supplied by Five Star were in use by nuclear power plant licensees at the time of Mr. Holub's protected activities." See Mr. Lieberman's letter dated June 6, 1993, Exhibit D. The fact that Five Star supplied raw materials tested by CPR to licensees, clearly does not satisfy the

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[1](...continued)
expressly or by necessary implication, we cannot enforce a subpoena so issued."

[2] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). In Oklahoma Press, the Supreme Court set forth a two-pronged inquiry into the enforceability of an administrative subpoena:

(1) The agency must be conducting a lawful investigation, and,

(2) The subpoenaed information must be relevant to that investigation.

Id. at 213. The Court went on to explain that investigatory subpoenas will only be enforced by federal courts when it is found "by the court's determination that the investigation is authorized by Congress, and is for a purpose Congress can order." Id. at 209.

As CPR's employment practices are not within the jurisdiction of the Commission, the investigation into the termination of Mr. Holub, which is the sole matter to which the subpoena relates, does not satisfy the first prong of the Oklahoma Press inquiry.

jurisdictional requirements of 42 U.S.C. § 5851. That statute states that "(n)o employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee"[3] may terminate or discriminate against an employee for certain protected activities.

A recent opinion of the United States Court of Appeals for the Fourth Circuit, Adams v. Dole, 927 F.2d 771 (4th Cir. 1991), explains the limits of § 5851. The Fourth Circuit rejected the argument that § 5851 covered all employers, and thus rejected the argument that the statutory language beginning with the word "including" was merely intended by Congress to be illustrative of persons protected by the provision, as opposed to words of limitation explaining "employer". Id. at 776. Instead, it was held that these words illustrated that "the section refers only to persons subject to the jurisdiction of the NRC".[4] As the Fourth Circuit pointed out, this is the only plausible way to read § 5851. The statute, and thus the Commission's jurisdiction, must have some limitation, for it is inconceivable that Congress intended to extend the reach of § 5851 to every

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[3] 42 U.S.C. § 5851 (1993)(emphasis added). It should also be noted that this language mirrors the Commission's own regulations which proscribe "[d]iscrimination by a Commission licensee, permittee, an applicant for a Commission license or permit, or a contractor or subcontractor of a Commission licensee, permittee or applicant. . . ." 10 C.F.R. § 50.7(a) (1993).

[4] Id. The Court went on to say that the section "refers only to NRC-related employers. . . . [T]he particularized listing identifies a consistent class of persons related only to the NRC and NRC licensees, thus tending to restrict the general term 'employer'". Id.

employer, regardless of an absence of affiliation with a nuclear facility.[5] Thus, CPR must be a "licensee", "applicant" for a license, or "contractor" or a "subcontractor" for a licensee, in order to come within the statute, and thus the jurisdiction of the Commission. Mere suppliers are not within the Commission's jurisdiction.

As was carefully explained in letters to the Commission dated May 6, 1993, July 23, 1993, and August 5, 1993, see Exhibits C, E and F, Five Star, CPR and the Babcocks do not come within this statutory definition simply because commercial grade grout or cement produced by Five Star was sold to NRC licensees. (The Commission has not asserted that CPR and Five Star are licensees or applicants for licenses.) The NRC's own regulations, e.g., 10 C.F.R. Part 26, "Fitness for Duty Programs", define the term "contractor" as "any company or individual with which the licensee has contracted for work or service to be performed inside the protected area boundary, either by contract, purchase order, or verbal agreement" (emphasis added). As was stated in the letter from counsel for the Movants dated August 5, 1993, CPR, Five Star, and their

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[5] The Fourth Circuit explained:

> "If we were to construe the term 'employer' in § 210 broadly and without consideration of the 'including' clause, some limitation would nevertheless have to apply to restrict the term to a person connected with a nuclear or energy facility, such as an owner, a licensee, or a contractor. We could never construe the term 'employer' to include any person who is not, or not yet, connected with such a facility."

Id. at 777.

related companies, do not engage in on-site supervision or installation at nuclear plants, and Mr. Babcock's unrefuted Affidavit demonstrates that Five Star is a supplier, not a contractor or subcontractor (while CPR merely tests Five Star's products).[6] Thus, CPR and Five Star are not "contractors" or "subcontractors" of a "licensee". As a result, their employment practices are beyond the scope of the Commission's authority. Since the Commission is without jurisdiction to investigate the termination of one of CPR's former employees, the subpoena relating solely to such an investigation must be quashed.

II.

THE COMMISSION SHOULD NOT INVESTIGATE THE SAME MATTER THAT IS THE SUBJECT OF THE PENDING PROCEEDING BEFORE THE DEPARTMENT OF LABOR.

Even assuming that the Commission has properly asserted jurisdiction over Five Star or CPR, a conclusion that Movants vigorously dispute for the above-stated reasons, there are discretionary reasons that the Commission should not pursue this investigation pending the final resolution of the Department of Labor proceeding now ongoing in the same matter.[7]

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[6] In response to the Commission's unsupported assertion, in its June 6, 1993 letter, that "Five Star and CPR are, in fact, and within the plain meaning of 10 C.F.R. § 50.7, contractor and subcontractor to Commission licensees", Exhibit D, p.2, Mr. William Babcock submitted an Affidavit swearing that, in fact, Five Star and CPR are not contractors or subcontractors of Commission licensees or applicants. Further, we indicated that, if the Commission had any documents to support its unsubstantiated assertion, we "would be pleased to review them." Exhibit E, p. 2. The Commission has not responded to that request.

[7] Movants contend that, as a result of the Commission's lack of jurisdiction, the Department of Labor is also without

(continued...)

The remedy provided for alleged violations of 42 U.S.C. § 5851 in the NRC's own regulations, 10 C.F.R. § 50.7, is to file a complaint with the Department of Labor. 10 C.F.R. § 50.7(b). Mr. Holub has filed such a complaint and there is currently pending a proceeding concerning the termination of Mr. Holub before the Department of Labor. The Commission's subpoena relates solely to the termination of Mr. Holub, as it merely requests the production of materials relating to Mr. Holub's employment at CPR and his termination. It would be improvident for the Commission to continue an investigation of the same sequence of events, an employment matter, when the Department of Labor is the agency assigned to employment matters, at least while the proceeding before the Department of Labor is pending.

A recent (July 9, 1993) Report by the Commission's Office of the Inspector General (Case No. 92-01N) notes that in October 1982, the Department of Labor and the Commission entered into a "Memorandum of Understanding" whereby the Commission agreed that it would not conduct an investigation parallel to a pending Department of Labor investigation.[8] In fact, this Report

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[7](...continued)
jurisdiction to investigate Mr. Holub's dismissal under the express terms of 29 C.F.R. § 24.2, which grants the Secretary of Labor the authority to investigate alleged violations of the employee protection provisions of, inter alia, the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. Since CPR and Five Star are not subject to 42 U.S.C. § 5851, neither are they subject to the jurisdiction of the Department of Labor under § 5851.

[8] The Inspector General's Report discusses the NRC's policy concerning "whistleblower" complaints as they relate to NRC licensees. Nowhere in the Report is there the slightest intimation that the Inspector General of the Commission believes
(continued...)

refers to a 1992 letter the Commission sent to the Honorable John D. Dingell, Chairman, House Committee on Energy and Commerce, in which the Commission strenuously objected to proposed amendments to the Energy Reorganization Act of 1974. Of central concern to the Commission was the proposed requirement that the Commission make an independent investigation of "whistleblower" allegations. The Commission viewed this requirement as unnecessarily duplicative and exceedingly costly.[9] These concerns recognize that the Department of Labor is the agency assigned responsibility for employment matters. Consequently, as a matter of discretion, the subpoena should be quashed, at least while the proceeding before the Department of Labor is pending.

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[8](...continued)
that the NRC's jurisdiction extends to a supplier of commercial grade materials such as Five Star, or its related entities, such as CPR.

[9] The pertinent parts of the Commission's letter read as follows (Report, pp. 11-12):

> "We strongly object to subsection 3004(h) of H.R. 776, which would: (1) impose an independent duty on the NRC to investigate whistleblower allegations, regardless of the pendency of a Department of Labor (DOL) investigation or federal court proceeding. The NRC would be directed not to delay any investigation during the pendency of a DOL investigation; and (2) bar the Commission from considering a determinatic by the DOL that a violation of section 210 had not occurred in determining whether any violation of that section or the Atomic Energy Act had occurred. . . . The approach contained in section 3004(h) is unsatisfactory because it will mandate unnecessary and costly NRC duplication of DOL efforts, particularly if we are precluded from considering a DOL finding rejecting the Whistleblower's claims. Without being given additional resources to accommodate this new workload, NRC investigatory resources will necessarily have to be diverted from other efforts."

III.

IF THE SUBPOENA IS NOT QUASHED, IT SHOULD BE MODIFIED SO AS NOT TO REQUIRE PRODUCTION OF DOCUMENTS ALREADY IN THE COMMISSION'S POSSESSION OR DOCUMENTS THAT ARE PRIVILEGED.

The Commission, in the course of its August 18-19, 1992 inspection of the Five Star/CPR facilities and the September 1, 1992 search and seizure at the same location, acquired "extensive factual documentation" regarding Five Star's and CPR's operations. See letter from Mr. Lieberman, June 6, 1993, Exhibit D. Movants are not certain what "factual documentation" the Commission possesses. Accordingly, even if the motion to quash is denied, under the doctrine of United States v. LaSalle National Bank, 437 U.S. 298, 314 (1978), citing United States v. Powell, 379 U.S. 48, 57-58 (1964), the subpoena should be modified so as not to require the production of any document or information already in the possession of the NRC, and the Commission should provide Movants with a list of the documents in its possession to determine whether there is any overlap.

Moreover, the subpoena must be modified so that CPR and Five Star will not be required to produce documents which are covered by the attorney-client privilege, Upjohn Co. v. United States, 449 U.S. 383 (1981), or the work-product doctrine[10]. Movants are entitled to such protection under the Sixth Amendment ("and to have the assistance of counsel for his defense."); see also Upjohn Co., 449 U.S. at 682 (attorney-client privilege is a

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[10] Hickman v. Taylor, 329 U.S. 495 (1947) (condemning the attempt to discover the written statements, private memoranda and personal recollections prepared or formed by opposing counsel without the requisite showing of undue hardship and prejudice).

fundamental right in the public interest). Movants relied on advice of counsel with respect to Mr. Holub's termination.

* * * * * * * *

Finally, we must observe that the Commission's investigators claim to be deputized by the United States Attorney's Office for the District of Connecticut to conduct an unspecified investigation of CPR and Five Star, and the U.S. Attorney's Office has confirmed that claim. As is typical, Movants have not been informed what the NRC has been deputized to investigate. But, if it is related to the matters sought under the subpoena, we strenuously object not only to the Commission's claim of authority over such matters, but also to the Commission's pursuit of information in aid of such an investigation through civil procedures, such as the instant subpoena. It is fundamentally unfair to pursue administrative discovery in aid of a criminal investigation. Donaldson v. United States, 400 U.S. 517, 536 (1971). This only heightens our concerns in this matter.

Conclusion

For the foregoing reasons, the subpoena issued to Mr. William N. Babcock must be quashed. In any event, the production

of privileged documents and documents already in the possession of the Commission may not be compelled.

Respectfully submitted,

Michael F. McBride
LeBoeuf, Lamb, Leiby & MacRae
1875 Connecticut Ave., N.W.
Suite 1200
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(202) 986-8000

H. James Pickerstein
Trager & Trager, P.C.
1305 Post Road
Fairfield, CT 06430
(203) 255-6138

Attorneys for H. Nash Babcock, William N. Babcock, Construction Construction Products Research, Inc., and Five Star Products, Inc.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
CONSTRUCTION PRODUCTS RESEARCH, INC.,	)	No. 1-93-027R
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 26th day of August, 1993, a copy of the "Motion To Quash Or Modify Subpoenas, and for Expedited Consideration" by messenger properly addressed to the following persons:

Mr. Ben B. Hayes
Director, Office of Investigations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. James Lieberman
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael F. McBride
Michael F. McBride

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF INVESTIGATIONS

N THE MATTER OF: NRC Investigation CASE NO. 1-93-027R

O: William N. Babcock (or Custodian of Records)
Five Star Products/Construction Products Research
435 Stillson Road
Fairfield, CT 06430

OU ARE HEREBY COMMANDED, pursuant to Section 161 (c) of the Atomic Energy Act of 1954, as mended, to appear at the Five Star Products/Construction Products Research, 435 Stillson Road, Fairfield, T 06430, on the 2nd day of September, 1993, at 10:00 A.M. and to provide the NRC with: any and all ocuments in your custody, control, or possession relating in any way whatsoever to the termination of mployment of Edward P. HOLUB on January 22, 1993, and the deliberations, discussions and ommunications that resulted in the decision to terminate Mr. HOLUB. The term document means, any andwritten, typed, recorded, reproduced communication, memoranda (whether issued or not), draft emoranda, notes, records, letters, messages, bulletin board postings, working papers, reports, summaries, pinions of consultants, notices, instructions, minutes of meetings, and inter & intra office communications.

dditionally, you are commanded to provide the NRC with any and all company policies, procedures, or equirements regarding involuntary terminations, along with position descriptions of jobs that were held by OLUB, Stanley NOWACKI, and Richard GRABOWSKI for the period of 1987 to January 22, 1993, cluding, but not limited to, the duties and responsibilities of those positions, and the expectations ssociated therewith.

nally, you are commanded to provide the NRC with the entire official personnel file for HOLUB, includin y disciplinary warnings or actions; as well as attendance records and compensation, salary, bonus and/or ayroll records concerning his employment during the period from 1987 to January 22, 1993.

BY ORDER OF THE DIRECTOR,
OFFICE OF INVESTIGATIONS

By Ben B. Hayes

Date August 17, 1993

Requested by: Ernest P. Wilson, Investigator
Office of Investigations
Field Office, Region I
475 Allendale Road
King of Prussia, PA 19405
Phone: (215) 337-5305

EXHIBIT A

On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the Commission may (1) quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion on just and reasonable terms. Such motion should be directed to the Secretary of the Commission, Washington, DC 20555. Failure to comply with the terms of this subpoena may result in the Commission's seeking judicial enforcement of the subpoena pursuant to Section 233 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2281.

RETURN

CERTIFICATE OF PERSONAL SERVICE:

I certify that I delivered a copy of this subpoena in hand to:

_____

_____

on _____, 19 ____, at _____ o'clock _____ M., at _____

_____

_____

CERTIFICATE OF SERVICE BY MAIL:

I certify that I caused a copy of this subpoena to be mailed by _____

_____ mail, postage prepaid, to the address specified and with delivery restricted to the person named thereon on _____, 19 ____, Receipt No. _____.

_____
(Signature)

_____
(Printed Name and Title)
Office of Investigations
U.S. Nuclear Regulatory Commission

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

APR 30 1993

Docket Nos.: 99901252
99901253

Mr. H. Nash Babcock, President
Construction Products Research, Inc.
435 Stillson Road
Fairfield, Connecticut 06430-3148

Dear Mr. Babcock:

SUBJECT: DISCRIMINATORY EMPLOYMENT ALLEGATION

On January 25, 1993, the Nuclear Regulatory Commission (NRC) became aware that you fired one of your employees, Edward P. Holub. We have reason to believe that this action was taken as a result of Mr. Holub raising legitimate safety concerns to the NRC. Mr. Holub filed a formal complaint with the U.S. Department of Labor's (DOL) Wage and Hour Division on January 28, 1993. In response to that complaint, the Wage and Hour Division conducted an investigation. By letter dated April 1, 1993, the Assistant Area Director of the Wage and Hour Division informed you that the evidence obtained during the Division's investigation indicated that the employee was engaged in a protected activity within the scope of the Energy Reorganization Act and that discrimination as defined and prohibited by the statute was a factor in the actions which comprised his complaint.

Based on a review of the complaint filed with DOL, a violation of 10 CFR Part 50.7 may have occurred which could have a chilling effect on other personnel.

Therefore, you are requested to provide a response to this office within 30 days of the date of this letter which:

1. Provides the basis for the employment action regarding the employee and includes a copy of any investigation reports you have regarding the circumstances of the action; and

2. Describes the actions, if any, taken or planned to assure that this employment action does not have a chilling effect in discouraging other employees from raising perceived safety concerns.

After reviewing your response, the NRC will determine what action is necessary at this time to ensure compliance with regulatory requirements.

Please indicate in your response whether any of the information you provide should be withheld from public disclosure based on the provisions of 10 CFR 2.790(a). Please cite the specific provision of this regulation that is applicable or other basis for nondisclosure.

EXHIBIT B

In accordance with Section 2.790 of the NRC's "Rules of Practice," Part 2, Title 10, Code of Federal Regulations, a copy of this letter will be placed in the NRC Public Document Room.

The response requested by this letter is not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, Public Law No. 96-511.

Sincerely,

Charles E. Rossi

Charles E. Rossi, Director
Division of Reactor Inspection
and Licensee Performance
Office of Nuclear Reactor Regulation

cc: Richard D. Sansone
Assistant Area Director
U.S. Department of Labor
Employment of Standards Administration
Wage and Hour Division
414 Chapel Street - Room 201
New Haven, Connecticut 06511

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May 6, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Charles E. Rossi
Director, Division of Reactor Inspection
and Licensee Performance
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Allegation of Discriminatory Employment Action

Dear Mr. Rossi:

The undersigned, and Harold James Pickerstein, Esq. of the Fairfield, Connecticut law firm of Trager and Trager, jointly represent Mr. H. Nash Babcock and Construction Products Research, Inc. ("CPR"). Mr. Babcock asked the undersigned to respond to your letter to him of April 30, 1993, in view of the legal conclusions you assert in your letter.

Mr. Holub's employment was terminated on January 22, 1993. The immediate reasons for that termination are set forth in Mr. Babcock's letter to Mr. Holub of the same date (which is enclosed), although I am informed that Mr. Holub was considered to be a marginal employee, at best, even before the egregious matters described in Mr. Babcock's January 22, 1993 letter came to light or occurred. Accordingly, there is no basis for the assertion in your letter that Mr. Holub was terminated because he made allegedly "legitimate safety concerns to the NRC", nor do you cite any other than the conclusions of the Wage and Hour Division of the Department of Labor. I am also informed that there are no "investigation reports . . . regarding the circumstances of the action".

EXHIBIT C

The Department of Labor's investigation was one-sided, unfair, and ignored crucial evidence that was available to it. The conclusions reached by the DOL about Mr. Holub's termination were wrong, as will be shown during the appeal hearing which Mr. Babcock and CPR have requested. Your conclusion that "Based on a review of [Mr. Holub's] complaint filed with DOL, a violation of 10 CFR Part 50.7 may have occurred" does not require a further response, other than to say that allegations are not evidence, and Mr. Babcock and CPR deny those allegations, and will prove them to be untrue in the DOL proceeding now pending.

Accordingly, Mr. Holub's termination could not possibly "have a chilling effect on other personnel", because Mr. Babcock's letter and his statement to the DOL made clear that Mr. Holub was not terminated for making allegations to the NRC. Mr. Babcock and CPR consider those allegations to be spurious in any event. Employees of CPR and its related companies have been shown a copy of Mr. Babcock's January 22, 1993 letter to Mr. Holub, and were familiar with his inadequate performance, thus ensuring that they know that Mr. Holub was not terminated for making allegations to the NRC.

In any event, CPR and its related companies are not "contractor[s] or subcontractor[s] of a Commission licensee, permittee, or applicant" within the meaning of 10 C.F.R. § 50.7, and thus Mr. Babcock and CPR are not within the NRC's jurisdiction in this matter.

No portion of this letter need be withheld under 10 C.F.R. § 2.790(a). I would appreciate it if, in the event of further correspondence in this matter with Mr. Babcock, Mr. Pickerstein and the undersigned be furnished a copy.

Very truly yours,

Michael F. McBride

Michael F. McBride

cc: Mr. H. Nash Babcock

Harold James Pickerstein, Esq.
Trager and Trager
1305 Post Road
Fairfield, Connecticut 06430

CPR

CONSTRUCTION PRODUCTS RESEARCH, INC.
435 Stillson Road • Fairfield, Connecticut 06430 • (203) 336-7955

January 22, 1993

Mr. Edward P. Holub
96 Haviland Drive
Trumbull, CT 06611

Dear Ed:

Since the time that we sent you our letter of January 18, 1993, we have now determined that you have failed for several years to sign or witness laboratory books for tests, or other scientific or technical work performed by you personally or under your direction of other of your employees. You are well aware, particularly as a result of your involvement as a witness in our recent patent infringement trial, of the critical importance under the patent laws of the need to maintain those laboratory books properly to establish our priority to the inventions of your employer. There are, of course, other important legal reasons to sign, date and witness those books. The failure to sign and date, or witness, those books was inexcusable, and those two failures only add to the failures that we have previously addressed in our letter of January 18 to you.

It was your clear responsibility to maintain current MSDS forms. As we informed you in our letter of January 18, you have failed in that responsibility for several years, and that failure, which just recently came to light in conversations with a customer, has now jeopardized business with that customer. That failure was inexcusable.

These failures over a long period of time give us no option but to conclude that your employment should be terminated, effective today, January 22, 1993. In this regard we will provide you with two (2) weeks' severance pay in lieu of notice and will continue to pay your medical insurance through the month of February. As per COBRA laws, your medical coverage may be continued under our policy at your expense by sending us a check for your premium before the beginning of each month to be covered. The distribution of your 401(k) funds and profit sharing shall be handled in accordance with company policy.

I wish to remind you that you are under a continuing responsibility to maintain absolute confidentiality with respect to the confidential information and trade secrets possessed by your employer, as you agreed when you signed the enclosed confidentiality agreement. You agreed that you were required to maintain confidential information and trade secrets in confidence at your interview that was conducted last week on January 12, 1993.

Please complete and sign the enclosed forms and return them, along with all items requested in the Exit Interview Form, in the enclosed self-addressed, stamped envelope.

Very truly yours,

H. Nash Babcock

H. Nash Babcock
President

HNB:sksc
Enclosures

NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

June 6, 1993

Mr. Michael McBride
LeBoeuf, Lamb, Leiby & MacRae
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728

Dear Mr. McBride:

SUBJECT: DISCRIMINATORY EMPLOYMENT ALLEGATION

This letter is in response to your letter of May 6, 1993, to Charles E. Rossi, Director, Division of Reactor Inspection and Licensee Performance. As noted in Mr. Rossi's letter of April 30, 1993, to Mr. H. Nash Babcock, the U.S. Department of Labor, Wage and Hour Division, concluded after investigation that discrimination as defined and prohibited by Section 211 of the Energy Reorganization Act was a factor in the actions which formed the basis of a complaint by Mr. Edward Holub concerning the termination of his employment by Construction Product Research, Inc. (CPR). Accordingly, Mr. Rossi requested that Mr. Babcock provide certain information, including any actions taken or planned, to assure that the termination of Mr. Holub does not have a chilling effect in discouraging other employees from raising perceived safety concerns. Your response of May 6, 1993, does not comply with Mr. Rossi's request.

Your assertions that CPR and its related companies are not contractor(s) or subcontractor(s) of a Commission licensee within the meaning of 10 CFR § 50.7, and thus that Mr. Babcock and CPR are not within the NRC's jurisdiction concerning this matter, are mistaken. During the NRC staff's August 18-19, 1992 inspection and September 1, 1992 search and seizure at Five Star Products, Inc. and CPR, the status of Five Star and CPR as contractor and subcontractor, respectively, to nuclear power plant licensees was demonstrated by extensive factual documentation, including the following:

1. Five Star entered into contracts to supply concrete and grout to various nuclear power plant licensees in conformance with 10 CFR Part 50, Appendix B and Part 21;

2. CPR accepted and executed purchase orders from Five Star which specified compliance with 10 CFR Parts 50 and 21 for testing concrete and grout supplied by Five Star under contract to nuclear power plant licensees in conformance with Parts 50 and 21;

3. Both Five Star and CPR have Quality Assurance (QA) Programs requiring compliance with Part 50, Appendix B and Part 21;

4. CPR is on the Five Star approved supplier list for nuclear work; and

5. A Five Star QA Audit Report dated July 31, 1992, evaluated CPR's compliance in following criteria specified by 10 CFR Part 50, Appendix B in regard to testing of Five star grout and concrete.

EXHIBIT D

Five Star and CPR are, in fact and within the plain meaning of 10 CFR § 50.7, contractor and subcontractor to Commission licensees. Consequently, the employee protection provisions of § 50.7 apply to CPR with respect to Mr. Holub's raising of safety concerns regarding products tested by CPR for Five Star and supplied by Five Star to nuclear power plant licensees in conformance with 10 CFR Part 50, Appendix B.

The fact that Five Star does not now supply products to NRC licensees does not terminate the NRC's jurisdiction over CPR and Five Star pursuant to 10 CFR § 50.7. Jurisdiction lies because products which were tested by CPR for Five Star and supplied by Five Star were in use by nuclear power plant licensees at the time of Mr. Holub's protected activities.

Providing the information requested in a chilling effects letter, such as the one sent to Mr. Babcock by Mr. Rossi on April 30, 1993, does not constitute an admission of wrongdoing. The information requested is necessary to assure that the termination of an individual who had raised safety concerns does not have a chilling effect upon the willingness or ability of other employees to raise safety concerns, and to determine whether there has been a violation of 10 C.F.R. § 50.7. The prevention of any chilling effect is of special concern in a case such as this one, because the U.S. Department of Labor, with statutory authority to determine violations of Section 211 of the Energy Reorganization Act, has made an administrative finding that discrimination as defined and prohibited by that statute, was a factor in Mr. Holub's termination. Whether that determination is ultimately affirmed or rejected in later legal proceedings does not determine whether Mr. Holub's termination could have a chilling effect upon other employees. A chilling effect could, nevertheless, occur. Contrary to your letter of May 6, 1993, the distribution to CPR employees of Mr. Babcock's letter of January 22, 1993, is not a satisfactory action to assure that Mr. Holub's termination does not have a chilling effect. The January 22, 1993, letter from Mr. Babcock to Mr. Holub terminated Mr. Holub's employment, for reasons found by the U. S. Department of Labor to be pretextual, and in no way informs employees of their rights to bring safety concerns to the attention of the NRC without retaliation.

Therefore, CPR is requested to provide a response to this office within 30 days from the date of this letter which:

1. Provides the basis for the employment action regarding the employee; and

2. Describes the actions, if any, taken or planned to assure that this employment action does not have a chilling effect in discouraging other employees from raising perceived safety concerns.

After reviewing the response, the NRC will determine what action is necessary at this time to ensure compliance with regulatory requirements.

Please indicate in the response whether any of the information provided should be withheld from public disclosure based on the provisions of 10 CFR 2.790(a).

Please cite the specific provision of this regulation that is applicable or other basis for nondisclosure.

In accordance with Section 2.790 of the NRC's "Rules of Practice", 10 CFR Part 2, a copy of this letter will be placed in the NRC Public Document room.

The response requested by this letter is not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, Public Law No. 96-511.

Sincerely,

James Lieberman, Director
Office of Enforcement

cc: H. Nash Babcock, President
Construction Products Research, Inc.
435 Stillson Road
Fairfield, Connecticut 06430-3148

Harold James Pickerstein, Esq.
Trager and Trager
1305 Post Road
Fairfield, Connecticut 06430

Richard D. Sansone
Assistant Area Director
U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
414 Chapel Street - Room 201
New Haven, Connecticut 06511

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July 23, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. James Lieberman
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Construction Products Research, Inc. and Mr. H. Nash Babcock-- Your Letter Dated June 6, 1993

Dear Mr. Lieberman:

We received your letter dated June 6, 1993 on June 16, 1993. We appreciate the extension of time that you gave us to respond to that letter, in view of the fact that Mr. Babcock was out of the country when your letter was received.

You assert that I was mistaken in my earlier letter to Mr. Rossi that CPR is not subject to the NRC's jurisdiction in this matter. Respectfully, we disagree for the reasons that follow.

To begin with, the NRC's regulations on the reporting of defects and noncompliance properly distinguish between "contractors" and "suppliers". See generally 10 C.F.R. Part 21. Were it otherwise, Sears and IBM, or any other supplier to nuclear plants, would be subject to the NRC's plenary jurisdiction. I assume that the NRC will concede that its jurisdiction does not extend that far.

Of course, the NRC has an interest in promoting and protecting the radiological health and safety of the public. 10 C.F.R. Pt. 2, App. C. While the regulations implementing quality control programs, 10 C.F.R. Part 21, "Reporting of Defects and

EXHIBIT E

Noncompliance," may apply to suppliers of basic components for a facility or licensed activity, the Part 21 regulations deal exclusively with reporting knowledge of defective components or noncompliance.[1] It has not been established that Five Star, CPR, or any other associated entity furnished "basic components" within the meaning of NRC's regulations, and we do not believe that it could be. Rather, the cementious products they furnished would be deemed "commercial grade items" by the NRC under 10 C.F.R. § 21.3 (a)(4). Suppliers of commercial grade items are exempt from the reporting requirements of Part 21. 10 C.F.R. § 21.7. In any event, "commercial grade items are not a part of a basic component until after dedication" (§ 21.3(a)(4)) and "dedication" occurs only "after receipt", even assuming that the item being supplied "is designated for use as a basic component" (§21.3(c-1)). Moreover, CPR was Mr. Holub's employer, while Five Star's materials are also available commercially. See enclosed Affidavit of William N. Babcock; see also §21.3 (a)(4). Finally, Five Star and Mr. Babcock are not now aware of any defects or noncompliance in nuclear facilities. See Babcock Affidavit.

In contrast, 10 C.F.R. § 50.7, "Employee Protection," which prohibits discrimination against employees for engaging in protected activities, by its terms applies to "a Commission licensee, permittee, an applicant for a Commission license or permit, or a contractor or subcontractor of a Commission licensee, permittee, or applicant." 10 C.F.R. § 50.7(a). That is the applicable regulation to the circumstances of this case, but CPR and Mr. Babcock are not subject to that regulation for the reasons set forth below.

Although you assert that CPR is a subcontractor to Five Star Products, and that Five Star is a "contractor" to NRC licensees, we are unaware of what it is you rely on for that assertion, which my clients inform me is incorrect. Five Star and CPR are not contractors to NRC licensees or permittees. See Babcock Affidavit. If you have documents that support your position, I would be pleased to review them. Your reference, however, to a purchase order will not suffice -- for if it did, the distinction between contractors and suppliers would vanish.

---

[1] Even the applicability of the Part 21 regulations is premised on a contractual relation between the vendor and the licensee and the licensee's contractors. 10 C.F.R. § 21.3(n) defines "supplying or supplies" as being "contractually responsible for a basic component used or to be used in a facility or activity which is subject to the regulations in this part."

Five Star has filled many purchase orders for nuclear plants over the years, in its capacity as a supplier, not a contractor. Id.

You assert that because Five Star's products were "in place" at the time of Mr. Holub's termination, that gives NRC jurisdiction. That is classic overreaching. Of course, grout sold by Five Star may be "in place" at nuclear power plants. So may be the products of many other suppliers, including such entities as Sears and IBM. That does not give NRC jurisdiction over such suppliers under § 50.7. Again, if it did give NRC other jurisdiction, the distinction between contractors and suppliers would vanish. Even if the assertion had merit, which it does not, it would imply that a supplier whose products were "in place" could never remove itself from the NRC's jurisdiction with respect to employment matters.

Five Star certified that its products met NRC regulations for some customers for a time, but it stopped certifying that its products met NRC regulations in 1992; thus, it was not even making such a certification in 1993, when Mr. Holub was terminated. Of course, the mere certification that its products met NRC regulations did not subject Five Star to NRC jurisdiction, but Five Star and CPR were not, under any stretch of the imagination, subject to the NRC's jurisdiction when Mr. Holub was terminated, and thus this inquiry must end.

I am aware that the NRC is not accustomed to having its jurisdiction challenged, but even the NRC is subject to the limitations of its statutory authority, and does not have authority to expand its jurisdiction where it deems that to be appropriate. This is a case in which its jurisdiction does not extend to the matter under investigation.

In any event, the assertions in Mr. Rossi's letter are based solely on the allegations made to the Department of Labor, and the NRC should at least conclude as a matter of discretion that it will allow DOL to conduct its hearing into the same matter, before NRC enters the fray. A good reason to do so is your assertion that there will be a "chilling effect" on the other employees of CPR even if CPR and Mr. Babcock prevail in the hearings DOL has yet to hold. I must say that I find that assertion hard to understand; whether the employees are "chilled" depends on what actually happened, not what the DOL's one-sided and unfair investigation found happened. As we now show, Mr. Holub was terminated for cause.

In response to your two requests, we already have complied with the first, by providing you with a copy of the January 22, 1993 letter terminating Mr. Holub's employment, which provided the immediate reasons for that termination. Of course, as I have told Mr. Rossi in my earlier letter, Mr. Holub was a marginal employee at best, and he knew that his employment was in jeopardy long before January 22, 1993, which presumably led to his unfounded allegations to the NRC. He was terminated for the reasons in that letter and because of his history of inadequate performance.

As to your second request, the CPR employees have seen the termination letter, informing them of the immediate reasons for Mr. Holub's termination. Thus, they are quite well aware that the reasons for his termination were sui generis, and thus could not possibly have a "chilling effect" on them. For the termination of an employee to have a "chilling effect" on other employees, the first employee would have to be a good employee. Here, Mr. Holub was anything but such an employee. In fact, I am told that operations have much improved since Mr. Holub's departure. Thus, far from having a "chilling effect", the termination of Mr. Holub's employment is clearly related to his own performance, and the matters set forth in the January 22, 1993 letter, which the other employees will understand were sui generis.

I do not know how else we might satisfy your request. CPR will not rehire Mr. Holub, in the event that is what you have in mind. Finally, this letter may be placed in the Public Document Room.

Very truly yours,

Michael F. McBride

Michael F. McBride

Attorney for Construction Products Research, Inc. and Mr. H. Nash Babcock

Enclosure

cc: Mr. H. Nash Babcock

Harold James Pickerstein, Esq.
Trager and Trager
1305 Post Road
Fairfield, Connecticut 06430

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:

Construction Products Research, Inc.
and
H. Nash Babcock

AFFIDAVIT

STATE OF CONNECTICUT

COUNTY OF FAIRFIELD :ss. FAIRFIELD, JULY 22, 1993

WILLIAM N. BABCOCK, BEING FIRST DULY SWORN, DOES DEPOSE AND SAY:

1. My name is William N. Babcock. I am 38 years of age, competent, and capable of making this affidavit. I have personal knowledge of the facts stated herein.

2. I am the President of Five Star Products, Inc. (hereinafter "Five Star"), 425 Stillson Road, Fairfield, Connecticut. I have been the President of Five Star since 1985. I am a Vice President of Construction Products Research, Inc., (hereinafter "CPR"), 435 Stillson Road, Fairfield, Connecticut, and I have been a Vice President of CPR since 1985.

9309070106

3. I am aware of the proceedings instituted by Edward P. Holub against my father, H. Nash Babcock, and Holub's former employer, Construction Products Research, Inc., before the United States Department of Labor, which the United States Nuclear Regulatory Commission (hereinafter "NRC") is also pursuing.

4. Five Star is a manufacturer of cement grouts, epoxy grouts, and concrete repair materials. Some of the products manufactured by Five Star are sold to the nuclear power industry. CPR tests those products.

5. Five Star has been supplying products to the nuclear power industry for approximately 20 years. Five Star manufactures and distributes these products, but does not install them.

6. The products that Five Star manufactures and distributes also have applications outside the nuclear power industry and are sold to the general public in the United States and throughout the world.

7. The products that Five Star manufactures and distributes to the nuclear power industry are ordered from Five Star by purchase order on the basis

of specifications, and not pursuant to contracts. It is the practice in some segments of the industry to issue blanket purchase orders for products, including products manufactured and sold by Five Star. These blanket purchase orders are not viewed by anyone employed by Five Star as supply contracts, or as anything other than unilateral requests to buy. Neither I, nor anyone else at Five Star has ever considered these blanket purchase orders to establish a contractual relationship between the purchaser and Five Star.

8. Neither CPR nor Five Star is, nor has either ever been, a contractor or a subcontractor of a NRC licensee or permittee, or an applicant for such a license or permit, as I understand the regulations of the NRC. Five Star's relationship with such licensees or permittees is as a supplier only.

FURTHER YOUR AFFIANT SAITH NOT.

William N. Babcock

WILLIAM N. BABCOCK

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 22nd DAY OF JULY, 1993.

NOTARY PUBLIC
My Commission expires , 1993.

Daniel C. McFarlane

DANIEL C. McFARLANE
NOTARY PUBLIC
My Commission Expires
October 31, 1998

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August 5, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. James Lieberman
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Construction Products Research, Inc. and Mr. H. Nash Babcock-- Your Letter Dated June 6, 1993

Dear Mr. Lieberman:

This is a supplement to my July 23, 1993 letter to you, with respect to the above-referenced matter.

It has come to my attention that the Commission's regulations, in 10 C.F.R. Part 26, "Fitness for Duty Programs", define "contractor" as "any company or individual with which the licensee has contracted for work or service to be performed inside the protected area boundary, either by contract, purchase order, or verbal agreement." This supports the view, expressed in my earlier letters, that the undefined terms "contractor" and "subcontractor" in Part 50 must also be limited to those who perform work on-site, and "supplier" must be read to apply to those who do not engage in on-site activities. As you may know, Construction Products Research, Inc. and Five Star Products, Inc., as well as their related companies, do not provide on-site supervision or installation for nuclear plants. Thus, the Part 26 definition of "contractor" only strengthens our view that the NRC lacks jurisdiction over Five Star, CPR, and Mr. H. Nash Babcock.

EXHIBIT F

This letter may be placed in the Public Document Room.

Very truly yours,

Michael F. McBride

Michael F. McBride

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