14847

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
NRC INVESTIGATION	)	No. 1-92-037R

MOTION TO QUASH OR MODIFY SUBPOENAS AND FOR EXPEDITED CONSIDERATION

Summary

Respondents Construction Products Research, Inc. ("CPR"), Five Star Products, Inc. ("Five Star"), and Messrs. H. Nash Babcock and William N. Babcock (collectively "Respondents"), hereby move to quash the subpoenas issued by the Office of Investigations ("OI") to Henry Allen, Diane Marrone and Susan Settino ("the three employees") by mail on March 11, 1994 (Exhibits A, B and C) on the basis that none of the Commission's regulations cited in the subpoenas authorize an investigation of Respondents. Moreover, Respondents are entitled to know OI's "articulable suspicion" of the "deliberate misconduct" that OI inferentially asserts by citing 10 C.F.R. § 50.5 in the three subpoenas. RTC v. Walde, ___ F.3d ___, 1994 WL 87383 at *7 (D.C. Cir. March 22, 1994). No such assertion has been articulated to Respondents. Because the subpoenas purport to require compliance on Thursday, March 31, 1994, this matter requires expedited consideration.

It is clear that Respondents have their own interests and rights to assert in relation to the subpoenas of their three employees. Therefore, Respondents submit this Motion to Quash on their own behalf, and on behalf of the three employees qua employees. This is especially true of Ms. Settino, who is Mr. H. Nash Babcock's Assistant and secretary, and as such is privy to attorney-client communications and attorney work product pertaining to Respondents. Under no circumstances may she be compelled to disclose Respondents' confidential communications with counsel, or counsel's work product.

The facts of this case were exhaustively and thoroughly set forth in Respondents' Motion to Quash the subpoena of William N. Babcock filed with the Commission on August 26, 1993 and in the letter to the Commission from Respondents' counsel submitted on October 28, 1993, in Docket No. 1-93-027R, among other documents submitted to the Commission. A copy of that October 28, 1993 letter, summarizing the factual mistakes in the Commission's October 21, 1993 Decision in Docket No. 1-93-027R, is attached hereto as Exhibit D.

Argument

THE SUBPOENAS TO THE THREE EMPLOYEES MUST BE QUASHED.

The Supreme Court has stated that an agency may not seek information in support of an underlying investigation that "overreaches the authority Congress has given." Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 217 (1946); see United

States v. LaSalle National Bank, 437 U.S. 298 (1978). The Second Circuit has held that an agency should not be permitted to engage in an unauthorized investigation, and to subject the target of such an investigation to the substantial expense and worry of defending against unwarranted interference with its affairs. "[T]here is 'no point in permitting the Government to institute an investigation with its attendant inconvenience, expense and annoyance if there is and can be no authority for undertaking it.'" United States v. University Hospital, State University of New York at Stony Brook, 729 F.2d 144, 150 (2d Cir. 1984), quoting, United States v. Cabrini Medical Center, 639 F.2d 908, 910 (2d Cir. 1981). The holding of Oklahoma Press, 327 U.S. at 213, reflects a compromise of important interests. These interests, often in conflict, are described in the following manner:

> "[T]he interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason."

Oklahoma Press, 327 U.S. at 213. Respondents respectfully aver that OI's actions constitute a classic case of "officious

intermeddling", and that it threatens to "eat up [their] substance."[1]

Under Section 161(c) of the Atomic Energy Act of 1954 as amended, 42 U.S.C. § 2201(c), that is cited by the Office of Investigations as authority for the instant subpoena, 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).[2] The Administrative Procedure Act, 5 U.S.C. § 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

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[1] Respondents informed the Commission in their September 28, 1993 letter in Docket No. 1-93-027R that the legal fees associated with this and related matters nearly exceed the annual revenues earned by Respondents in all their business with the nuclear industry. The NRC acknowledged receipt of that letter (Order at 1), but this seems to have made no impression on the Commission.

[2] 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 expressly or by necessary implication, we cannot enforce a subpoena so issued."

conducting a lawful investigation.[3] Not only has OI not illustrated that the testimony of the three employees is sought in connection with a lawful investigation, it has not even seen fit to state the basis for its investigation of Respondents in the subpoenas.

The United States Court of Appeals for the District of Columbia recently refined the Oklahoma Press test to require not only that an administrative subpoena be issued in aid of an investigation authorized by statute, but also that the information sought under the subpoena be "reasonably relevant" to that authorized investigation and the agency must have an "articulable suspicion" that one or more of its regulations has been violated. RTC v. Walde, ___ F.3d ___, 1994 WL 87383 (D.C. Cir. March 22, 1994) (refusal to enforce agency subpoena of target's personal financial records). The Court referred to Justice Holmes' eloquent reminder that administrative agencies are bound to abide by the sacrosanct tradition of privacy

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[3] 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.

protected by the Fourth Amendment of the Constitution, just as every citizen of this country is so bound. Few can articulate these concepts as well as Justice Holmes, who stated,

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question of whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent."

Id. at *6, quoting, Federal Trade Commission v. American Tobacco Co., 264 U.S. 298, 305-06 (1924)(cites omitted).

There can be not be a more classic example of a "fishing expedition" engaged in by an administrative agency than OI's investigation of Five Star and CPR. In spite of the Staff's recognition that the Respondents' products "did not constitute a safety concern", Response filed September 9, 1993 in Case No. 1-93-027R at 6, OI continues to pursue the Respondents and their employees for reasons that have not be articulated after nearly two years. One need not stray any further than the face of the subpoenas that form the basis for this Motion to Quash, to see first-hand the kind of non-existent allegations to which the Respondents have been exposed over the course of the OI's almost two-year old investigation of their operations.

For example, the subpoenas recite that the three employees are to testify about "potential violations of NRC Regulations including, but not limited to, 10 CFR 50.5, 10 CFR

21.41, and CFR 50.9". Obviously, the Respondents cannot be expected to respond to uncited authority, so they must confine this Motion to the three regulations cited.

None of the three NRC regulations that were cited in the subpoenas, 10 C.F.R. §§ 50.5, 21.41 and 50.9, give the Commission authority to interview the three employees, nor has the Staff ever articulated facts which constitute a "reasonable suspicion" that any of its regulations have been violated. 10 C.F.R. § 50.5 (1993) deals with "deliberate misconduct". There are only two possible bases for an assertion that Respondents or anyone associated with Five Star or CPR, committed "deliberate misconduct". First, there was the baseless allegation of a former employee of CPR, Mr. Edward Holub, that the testing done on Five Star's products was inadequate. This clearly cannot be the grounds for the Staff's continued investigation of Five Star and CPR because, as Respondents have pointed out, the Staff expressly concedes that it has concluded that Five Star's products "did not constitute a safety concern". Response filed on September 9, 1993 in Case No. 1-93-027R, at 6.

The second, and only other conduct to which the allegation conceivably could be addressed, is Mr. H. Nash Babcock's innocent request on August 19, 1992, because he was about to go overseas on a previously-scheduled business trip, that representatives of the Commission's Office of Investigations, as a courtesy, return to Five Star to continue their investigation after the Labor Day weekend, when key members

of the staff of Five Star and CPR would return to work following the holiday. The Staff has mischaracterized this request for courtesy from it as a denial of access and a refusal to permit the representatives to return to Respondents' premises. See NRC Information Notice No. 92-66. (Respondents' continuing request to the Commission to correct or supplement that Notice has been ignored.) That matter could not conceivably constitute "deliberate misconduct", but Respondents aver, on information and belief, that Mr. Babcock's simple request was the basis for a referral of the matter by the Commission to the United States Attorney's Office for the District of Connecticut. So far as Respondents are aware, that referral resulted in an investigation by the U.S. Attorney's Office which has not been terminated.[4]

Once an agency has referred a matter to the Department of Justice, thus triggering the criminal process, that agency must cease to use its own investigative authority in the same matter. United States v. LaSalle National Bank, 437 U.S. 298 (1978); Donaldson v. United States, 400 U.S. 517, 536 (1971). This "prophylactic restraint" serves two purposes. First, it ensures that the scope of criminal discovery is not expanded inappropriately through the use of civil discovery, and second,

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[4] The Commission's attempt to deny the existence of a referral of this matter to the United States Attorney's Office (October 21, 1993 Order in Case No. 1-93-027R at 24) is unavailing. That Office has confirmed the existence of the referral, and that it came from the Commission. We do not know the precise nature of the referral, but the Commission does. Thus, the Commission is "hoist by its own petard".

it prevents infringement on the role of the Grand Jury as the principal tool of a criminal investigation. LaSalle, 437 U.S. at 312. At all times, an agency is bound to use its investigatory authority in good faith. Id. at 313. Because this matter has been referred to the United States Attorney's Office by the Commission, and because it is improper for the Commission to utilize its civil investigatory authority to gather information in support of a criminal investigation, the discussion between Mr. Babcock and the representatives of the Office of Investigations on August 19, 1992, cannot provide a lawful basis for these subpoenas. Since there are no other possible bases to support an allegation of "deliberate misconduct", the citation to 10 C.F.R. § 50.5 cannot be a valid justification for these subpoenas.

OI's citation to 10 C.F.R. § 21.41 does not permit the enforcement of these subpoenas. That regulation, by its express terms, does not apply to Respondents. Specifically, § 21.41 requires "entit(ies) subject to the regulations in this part", to allow the Commission investigate its records and premises, among other requirements. However, 10 C.F.R. § 21.7 expressly provides that "(s)uppliers of commercial grade items are exempt from the provisions of this part to the extent that they supply commercial grade items". The grout produced by Five Star, and tested by CPR, cannot logically or rationally be considered anything but a commercial grade item. Thus, Five Star and CPR are merely

suppliers of goods and services to the nuclear industry, and as such are not subject to Part 21.

In its decision issued October 21, 1993, the Commission has taken issue with this conclusion, arguing that because Commission licensees submitted "purchase orders" to Five Star for its grout, and "purchase orders" are "contracts", therefore Five Star is a "contractor" for the purposes of the Commission's regulations. This conclusion is erroneous both as a matter of fact, and as a matter of law. As a matter of fact, Mr. William N. Babcock submitted an unrefuted affidavit to Mr. James Lieberman of the Commission's Office of Enforcement along with counsel's explanatory letter on July 23, 1993, stating that these "purchase orders" are not in fact "contracts" (copy attached hereto as Exhibit E). As a matter of law, the Commission's definition of "contractor" proves too much. If every supplier of commercial products to licensees, such as Ace Hardware, is a "contractor" to the nuclear industry (which must be true under the Commission's reasoning, because each purchase from Ace Hardware gives rise to a legal "contract"), then no one could be a mere "supplier" to the nuclear industry -- thus making the distinction between "contractors" and "suppliers" in 10 C.F.R. § 21.7, meaningless and superfluous. No section of the Commission's regulations may be construed to be meaningless or superfluous, and therefore the Commission's conclusion proves too much. Thus, we respectfully assert that the Commission's prior interpretation of the term "contractor" is not supportable, and

that mere suppliers such as Five Star and CPR cannot reasonably be included within the scope of Part 21's definition of "contractor". Since Five Star and CPR are exempted from the provisions of 10 C.F.R. Part 21 by the express terms of 10 C.F.R. § 21.7, neither Respondents nor their employees are subject to 10 C.F.R. § 21.41.

Finally, 10 C.F.R. § 50.9, again by its express terms, does not apply to CPR and Five Star. That section speaks to applicants for a license and licensees, requiring those entities to ensure that information provided to the Commission is complete and accurate in all material respects. Five Star and CPR are neither applicants for Commission licenses, nor are they licensees. Therefore, § 50.9's requirements are inapplicable to CPR, Five Star, and the three employees, and cannot provide a lawful basis for the subpoenas to the three employees.

Conclusion

The Commission, as a creature of statute, must act only within the scope of the authority granted to it by Congress. It has no statutory authority over suppliers as such; its authority to subpoena "any person" under Section 161(c) of the Atomic Energy Act applies only to matters within the authority of the Commission, such as investigations of licensees. In any event, even if the Commission was to subpoena a supplier in an investigation of an entity within its jurisdiction, it would have to have an "articulable suspicion" of misconduct before investigating the matter. The conduct that the Office of

Investigations evidently takes exception to -- a request by Mr. Babcock to Commission employees to return when key employees of Respondents would be back in their offices -- has evidently been referred to the United States Attorney's Office for the District of Connecticut. That referral was itself objectionable and baseless. In any event, that voluntary referral deprives the Commission of any continuing authority in this matter, under controlling Supreme Court precedent, assuming arguendo it had any jurisdiction in the first place.[5]

Respectfully submitted,

Michael F. McBride

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

[5] In the event that these subpoenas are not quashed outright, Respondents respectfully request oral argument before the Commission on this Motion, because the subpoenas raise several important issues of jurisdiction, procedure and fairness.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of	)	
	)	
NRC INVESTIGATION	)	No. 1-92-037R
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 29th day of March, 1994, a copy of the foregoing "Motion to Quash or Modify Subpoenas, and for Expedited Consideration" by messenger, or by facsimile, properly addressed to the following persons:

Mr. Ben B. Hayes
Director, Office of
Investigations
U.S. Nuclear Regulatory
Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852
(By Messenger)

Mr. Jeffrey A. Teator
Office of Investigations
475 Allendale Road
King of Prussia, PA 19406
(By facsimile)

Jeremiah Donovan, Esq.
123 Elm Street -- Unit 400
P.O. Box 554
Old Saybrook, CT 06475
(By facsimile)

Deirdre U. Gildea

Deirdre U. Gildea

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 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

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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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. P 434745 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 3-5-94

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. 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

LEBOEUF, LAMB, LEIBY & MACRAE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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LOS ANGELES, CA
SALT LAKE CITY, UT
SAN FRANCISCO, CA
SOUTHERN U.S.:
JACKSONVILLE, FL
RALEIGH, NC

October 28, 1993

VIA HAND DELIVERY

Mr. Samuel J. Chilk
Secretary, U.S. Nuclear
Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

Re: Five Star Products, Inc. and Construction Products Research, Inc., NRC OI Docket No. 1-93-027R

Dear Mr. Chilk:

As counsel for Five Star Products, Inc. ("Five Star") and Construction Products Research, Inc. ("CPR"), this is to advise you that, after due consideration, Five Star and CPR respectfully disagree with the Commission's unprecedented assertion, in its October 21, 1993 Order, of jurisdiction over an entity that is not a licensee, applicant for a license, "contractor" of a licensee (within the meaning of 42 U.S.C. § 5851 or the Commission's regulations), or a manufacturer of a "basic component" of a licensed facility (again, as defined by the Commission's regulations). The Commission asserts now that Five Star is such a "contractor", but the unrebutted evidence of record (in Mr. Babcock's affidavit) is to the contrary. The term "contractor" has never been understood to refer to a supplier, which is what Five Star is, and, if it did, the distinction in the Commission's regulations between "contractor" and "supplier" would vanish. Thus, the Commission's treatment of Five Star as a "contractor" proves too much.

Indeed, the Commission makes the unprecedented assertion that a mere supplier of grout is a manufacturer of a "basic component", which is nowhere provided in the Commission's

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regulations and would completely eviscerate the definition of "supplier". See 10 C.F.R. § 21.7 (exempting "suppliers" from the Commission's reporting responsibilities). A bag of grout cannot constitute a "basic component" as that term is defined in 10 C.F.R. § 21.3(a)(1993), which plainly contemplates that "basic component" means manufactured items; it is evident that bags of grout could not be "basic components" within the meaning of the Commission's regulations by the further explanation, in 10 C.F.R. § 21.3(c-1) that a "commercial grade item" is not a part of a "basic component" until after "dedication", and "dedication" does not occur until "after receipt". The Commission well knows that "basic component" has always been understood to refer to nuclear systems and related equipment, such as the reactor vessel, steam generators, and the like. The Commission cannot cite a single instance in which a bag of grout has been defined by it to be a "basic component", and plainly it is not, under the regulations cited.

The basis for the Commission's Order amounts to the following: that because the Commission has unquestioned authority to investigate licensed facilities, and because Five Star sells grout to licensees, therefore the Commission has jurisdiction over CPR's employment practices. There is no statutory authority for that double non sequitur. The Commission's reliance on Union Electric Company (Callaway Plant, Units 1 and 2), ALAB-527, 9 N.R.C. 126 (1979), for that proposition is obviously misplaced, for that proceeding obviously involved a licensee and its admitted "contractor", not (as here) only a supplier. Simply put, the assertion that "any employee of . . . a firm that deals directly or indirectly with NRC licensees on nuclear-related matters and who is in a position to have information relating to nuclear safety must feel free to come to the NRC with that information" (Order at 12), does not comport with the terms of 42 U.S.C. § 5851, which provides for protection of employees of licensees or "contractors" and "subcontractors" "of such a licensee". The statutes cited by the Commission regarding its authority over any "person" (Order at 8-9) also require that the matter under its investigation be one for which it has "authority provided in this Act" (42 U.S.C. § 2201(c)). Were it otherwise, the Commission would be asserting jurisdiction over all "persons", which is obviously not the charter of the Nuclear Regulatory Commission, unless they are "licensees". Thus, the Commission has wholly evaded the central question, which is whether the employment activities of a supplier who is not a

"contractor" of a licensee, as that term is defined in the Commission's own regulations, in prevailing construction industry parlance, and in the Commission's long-standing use of the term, is within the Commission's "authority provided in this Act". Even if (contrary to the facts here) what the supplier provides may have safety significance, it is nowhere provided that the Nuclear Regulatory Commission therefore has jurisdiction over that supplier's employment practices. The cases on point, which we cited, but the Commission ignored, uniformly hold that the Department of Labor, not the Commission, has "exclusive" jurisdiction over employment practices of entities within the Commission's jurisdiction.

Obviously, we disagree with much of what the Commission said in its Order, but it does not appear fruitful to continue the legal debate in this letter. There are, however, a large number of factual errors in the Order which we feel compelled to point out to the Commission; the more significant of which are set out below.

COMMISSION'S ASSERTION	FACTS
P. 2: "Following those tests, CPR issued Certificates of Conformance, certifying that the materials manufactured by Five Star meet the requirements of 10 C.F.R. Part 50, Appendix B."	There are no product standards in 10 C.F.R. Part 50, Appendix B applicable to grout. These raw materials are mixed with water on-site by a licensee or contractor before use, and the resulting product is inspected on-site by the licensee, one of its contractors, or the NRC's Resident Inspector, not Five Star or CPR. CPR's involvement with licensees ends when it supplies its raw materials to licensees. Although CPR has written the only handbook in the construction industry relating to the proper handling of grout, CPR does not oversee the on-site handling of its products.

COMMISSION'S ASSERTION	FACTS
P. 3: "The Staff has also submitted an exhibit documenting the purchase by an NRC licensee of material manufactured by Five Star and certified by CPR as meeting the requirements of 10 C.F.R. Part 50, Appendix B, i.e., as safety-grade material."	The certification by CPR does not give rise to any regulatory requirement, any more than a statement that a product does not meet an agency's standards would deprive the agency of jurisdiction over the manufacturer. Whether or not someone says their product meets agency standards is irrelevant to jurisdiction; the statutory limitations applicable to an agency determine its jurisdiction.

COMMISSION'S ASSERTION	FACTS
P. 4: "Subsequently, Mr. Babcock again denied the NRC inspectors access to the laboratory on August 19th, and refused the inspectors' request for access to the laboratory technicians' notebooks."	Mr. Babcock offered the NRC inspectors access to the laboratory or notebooks if they would sign the same confidentiality agreement that all outsiders having access to the facility are required to sign, to protect the Company's patent-related information and trade secrets; the NRC inspectors were denied access only because they refused to agree to keep the Company's patent-related information and trade secrets confidential. Although the NRC inspectors were denied access to the laboratory because of their refusal to sign the confidentiality agreement, the consulting engineer that accompanied the inspectors, John Suma, was escorted into the laboratory facilities. Inasmuch as the Company was then, and still is, engaged in patent infringement litigation, the NRC inspectors had only themselves to blame for not gaining access to the laboratory notebooks, but due to Mr. Suma's visit to the laboratory, it is a mischaracterization to intimate that NRC officials had been completely denied access to the laboratory.

COMMISSION'S ASSERTION	FACTS
P. 4: "Finally, Mr. Babcock asked the inspectors to leave the Five Star/CPR premises before they had the opportunity to review all the documents which had originally been made available to them."	Mr. Babcock did not order the NRC Inspectors to leave Five Star's facilities. Instead, on advice of counsel, he merely asked the Inspectors if, out of courtesy, they would mind returning to the facilities after the Labor Day holiday. The basis for this request was the fact that he was preparing to leave the country on an extended overseas business trip, and that many of his key employees, whose presence was necessary to facilitate the investigation, were on vacation at the time, and would be returning after the holiday.

COMMISSION'S ASSERTION	FACTS
P. 5 n.1: "The NRC Staff has since returned copies and/or originals of those documents to Five Star and/or CPR as appropriate."	No originals have been returned to Five Star or CPR. The copies that have been returned are wholly inadequate, either because they are completely jumbled or because they were poorly copied. Repeated requests for those documents have been refused, and the Government's refusal is harming Five Star's ability to do business, without there being any reason for the Government to refuse to return originals. In addition, this information is crucial to the many patent prosecutions pending before the Patent Office because a company must be able to justify the dates and data that patent applications were based on, in order to successfully defend a patent, and both Five Star and CPR will be unable to do so without the information being withheld from them.

COMMISSION'S ASSERTION	FACTS
P. 6: "In its response, CPR refused to provide either the basis for Mr. Holub's termination or a description of any activities taken to prevent a 'chilling effect' on its other employees."	CPR provided, in its May 6, 1993 letter to the Staff, which was also an exhibit to its Motion to Quash, its January 22, 1993 letter of termination to Mr. Holub, which set forth the reasons for his termination. In its response, CPR explained that Mr. Holub was also a marginal employee at best, and that his inadequate performance prior to the immediate events set forth in its letter were an additional basis for his termination. We also explained that, because Mr. Holub was terminated for cause unrelated to calling the NRC and his circumstances were sui generis, there could not possibly be any "chilling effect" on the other employees. The Commission may disagree with that conclusion (although it has never explained its disagreement, and it is hard to imagine how it could), but it cannot assert that CPR refused to provide the requested information.

COMMISSION'S ASSERTION	FACTS
P. 13: "We believe that this is especially true where -- as here -- the 'supplier' offered goods and services which were certified to meet the NRC's requirements for installation in safety-related applications."	Neither CPR nor Five Star provides "services" to the nuclear industry, but rather only supplies goods, in the form of grout as a raw material. Thus, neither Company certified any services, nor did they install anything for the nuclear industry. Neither CPR or Five Star has ever engaged in supervision, installation or guidance of any sort at a licensed facility.
P. 13: "Because the cement and grout purchased from Five Star carried this certificate, NRC licensees were likely to use such materials in safety-related applications without further testing or investigation."	Because Five Star and CPR provided no services to the nuclear industry nor did they do any installation, it was always the case that the licensee or its contractors (i.e, the entity or entities doing the construction or installation) would test or investigate the products at installation time. The fallacy in the Commission's thinking is that it does not seem to understand that Five Star and CPR do not, and never did, supply finished products for use at a licensed facility, and thus the determination of the safety of such facilities necessarily would depend on the product installed at the plant and not the raw material that went into it.

We are willing to provide our list of privileged documents that would otherwise be responsive to the subpoena, but only if such would not be considered by the Commission to constitute a

waiver; in light of that possibility, we cannot supply the list now, but the basis for the assertion of privilege is attorney-client communication. I am certain that the Commission will agree that attorney-client communications are privileged, and thus all the documents on the list need not be produced in any event. (We did not produce the list earlier, because of the press of time when the Motion was filed, and because of our the assertion that the Commission lacked jurisdiction. We certainly have not "abandoned this argument", as the Commission asserts in the Order at 24 n.11. What the Commission cited in that footnote (Reply at 4 n.4) was hardly an "abandonment" of the argument. Instead, we made the opposite point, that the Staff conceded that attorney-client communications are privileged, if an appropriate list is provided. If, as the Staff asserted (Response at 9 n.12), 10 C.F.R. § 2.720 is not applicable to the Motion, then no Commission regulation applied, and thus there was no requirement to submit this list at an earlier date.)

Unfortunately, we have been informed by Mr. Charles Mullins, of the Office of the General Counsel, that the Staff believes a meeting at this point would be futile. As a consequence, as I discussed with Mr. Mullins, we respectfully inform the Commission that it should not send any designated representative to Five Star's and CPR's offices on Monday, November 1 to enforce the subpoena, as we still maintain our position that the Commission lacks jurisdiction over the subject matter of the subpoena. However, we remain willing to meet with the Staff to discuss the matters contained herein, in an effort to reach a resolution to this, and related matters, provided that the Commission would have to agree that such did not constitute an admission of jurisdiction. If the Commission insists on proceeding under subpoena, despite this offer, it will have to seek enforcement of the subpoena in a United States District Court with in personam jurisdiction. See General Public Utilities Corp. (Three Mile Island Nuclear Generating Station, Unit No. 2), 18 N.R.C. 315, 325 (1983). Of course, nothing prevents the Commission from deferring its investigation until the Department of Labor concludes the matter before it.

Finally, we find particularly troubling three aspects of the Commission's Order: one, that the Commission now would suggest that it may investigate twenty years of CPR's employment

practices, rather than only the matters addressed in the subpoena at issue -- Mr. Holub's termination (Order at 19, 21 n.9) -- despite the fact that the Staff has concluded that Five Star's products "do not constitute a safety concern", thus indicating that Mr. Holub's allegations were baseless, and there is no other allegation, let alone any evidence, of any problem whatsoever at Five Star or CPR; two, that the Commission would assert that it has no documents in its possession which are requested in the subpoena (Order at 24), when the Staff's Response (Magruder Affidavit at p.3, ¶ 4) admitted that the Staff does have some documents relating to "personnel matters" that Mr. Magruder felt compelled to mention, presumably because he believes they would be responsive to the subpoena; and three, that the Commission would choose to ignore the case law cited to it, which cases hold that the Department of Labor's jurisdiction over employment matters of entities within the Commission's jurisdiction is "exclusive". If the Department of Labor's jurisdiction over entities within the Commission's jurisdiction is exclusive, a fortiori the Commission has no jurisdiction over the employment practices of entities outside its jurisdiction. The Court of Appeals for the District with in personam jurisdiction over Five Star and CPR -- the Second Circuit -- has held that the Department of Labor's jurisdiction, even over entities who are within the Commission's jurisdiction, is "exclusive". Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 637 (2nd Cir. 1989).

I would be pleased to discuss this matter further with the Office of the General Counsel and the Staff, if the Staff wishes to meet with us.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

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

cc: Commissioner Gail de Planque
Jack R. Goldberg, Esq.
Mr. Ben B. Hayes
Giovanna M. Longo, Esq.
H. James Pickerstein, Esq.
Commissioner Forrest Remick
Commissioner Kenneth Rogers
Joseph F. Scinto, Esq.
Chairman Ivan Selin
Robert M. Weisman, Esq.

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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

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

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.

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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, 1996