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NUCLEAR REGULATORY COMMISSION

Title: 21st Century Technologies, Inc.

Docket Number: 030-30266-CIVP
ASLBP No.: 97-729-01-CIVP

Location: Rockville, Maryland

Date: Wednesday, August 27, 1997

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Pages 1-51

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ATOMIC SAFETY AND LICENSING BOARD
 PRE-HEARING CONFERENCE

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IN THE MATTER OF:

21st CENTURY TECHNOLOGIES, INC. : Docket No.

: 030-30266-CIVP

(License No. 30-23697-01E) : ASLBP No.

: 97-729-01-CIVP

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Wednesday, August 27, 1997

U.S. Nuclear Regulatory Commission

Hearing Room T3B45

11545 Rockville Pike

Rockville, Maryland

The above-entitled matter came on for hearing
 pursuant to notice, at 1:54 p.m.

BEFORE:

THOMAS S. MOORE Chairman

DR. JERRY KLINE Administrative Judge

LESTER S. RUBENSTEIN Administrative Judge

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1 APPEARANCES:

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P-R-O-C-E-E-D-I-N-G-S

1:54 p.m.

CHAIRMAN MOORE: Good afternoon. Sorry for the previous interruptions, and Mr. Tourtellotte, I apologize to you for the inconvenience of not allowing you to come up without an escort.

This is a pre-hearing conference in the matter of 21st Century Technologies, Incorporated, Docket No. 030-30266, a Civil Penalty proceeding.

I am Judge Moore; on my right is Judge Kline. Judge Rubenstein is on a telephone connection with us.

ADMINISTRATIVE JUDGE RUBENSTEIN: Hello.

CHAIRMAN MOORE: First, it would be appropriate if counsel would identify themselves for the record, starting with the staff.

MS. MARCO: Good afternoon. I'm Catherine Marco. I'm counsel for NRC staff.

ADMINISTRATIVE JUDGE RUBENSTEIN: Please speak up and speak into the microphone.

MS. MARCO: I'm sorry. This is Catherine Marco, counsel for NRC staff, and with me today is Ann Hodgdon.

ADMINISTRATIVE JUDGE RUBENSTEIN: That's great. Thank you.

MS. MARCO: You're welcome.

MR. TOURTELLOTTE: My name is Jim Tourtellotte
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1 and I'm counsel for 21st Century Technologies. And hello,
2 Les.

3 ADMINISTRATIVE JUDGE RUBENSTEIN: Hi, Jim.

4 CHAIRMAN MOORE: First, a housekeeping matter.
5 In our initial July 3rd, 1997, pre-hearing order, counsel
6 for --

7 ADMINISTRATIVE JUDGE RUBENSTEIN: Tom, you're
8 fading out on me.

9 CHAIRMAN MOORE: -- counsel were directed to
10 file appearance statements. We have not received one from
11 you, Mr. Tourtellotte. If you would be so kind as to
12 remedy that, and please include your telephone number and
13 any fax number you have. It would be helpful in the
14 future in contacting you.

15 MR. TOURTELLOTTE: By way of explanation, I
16 inquired about that and my understanding, or at least I
17 was given to understand, that my previous notice of
18 appearance was satisfactory for that purpose. So I
19 thought about that, but I will comply with your request.
20 I want you to know it wasn't because I didn't think about
21 it.

22 CHAIRMAN MOORE: Fine. It would be appreciated.
23 We had to scramble to try to contact you --

24 MR. TOURTELLOTTE: I see.

25 CHAIRMAN MOORE: -- and if you could give us one
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1 with your telephone number and fax number, and if you have
2 an Internet address that's always a safeguard to getting
3 in touch with you that way.

4 It would also be appreciated if the staff would
5 file with us, a copy of the licensee's license. We didn't
6 note that in the first Order. That would probably be
7 helpful to go ahead and have that filed.

8 MS. MARCO: I will certainly do that.

9 CHAIRMAN MOORE: I'm sorry?

10 MS. MARCO: I will do that, yes.

11 CHAIRMAN MOORE: Thank you. Before hearing from
12 counsel on the issues involved in this proceeding, I think
13 it probably appropriate to first address where your
14 settlement discussions that you mentioned in the joint
15 pre-hearing conference statement are going.

16 MS. MARCO: Well, we really have not had further
17 negotiations since the statement that we made in the
18 report.

19 CHAIRMAN MOORE: Why not?

20 MS. MARCO: We have not -- we have just not been
21 in contact with each other since that time.

22 MR. TOURTELLOTTE: I can advise the Board as to
23 what I offered, and have had no particular response to it.

24 MS. MARCO: Your Honor, we would object to that.

25 CHAIRMAN MOORE: Well, I don't think we need to

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1 put on the record any -- what the last offer of the
2 applicant -- or the licensee, rather, was. But very
3 frankly, speaking for myself but I believe -- and my
4 colleagues can chime in -- this case is prime candidate to
5 settle.

6 Mr. Tourtellotte, in the filings that we have,
7 the penalty was mitigated \$5,000.

8 MR. TOURTELLOTTE: Yes.

9 CHAIRMAN MOORE: And the licensee pled financial
10 strain in seeking to mitigate that penalty before the
11 hearing stage. Yet frankly, it's somewhat incongruous to
12 litigate the issue you wish to litigate over the amount of
13 money that's involved.

14 Now, I have no idea whether you're representing
15 21st Century pro bono, but for the amount of money
16 involved it's not a stretch to believe that it makes not a
17 lot of sense after having pleaded financial strain to get
18 a penalty mitigated, to continue with this case. And I
19 think that frankly, the parties should settle it.

20 Failing that, we're perfectly prepared to decide
21 the issues as they come before us, and let's then turn to
22 the issues. In your joint pre-hearing report you could
23 not -- counsel could not agree on what the issues were.
24 Clearly, and we'll start with Mr. Tourtellotte, you seek
25 to raise a jurisdictional issue; the power of the Agency

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1 over your client in these matters.

2 MR. TOURTELLOTTE: Yes.

3 CHAIRMAN MOORE: But you have stated five issues
4 that are at least tangentially related to jurisdiction.
5 We see one issue; whether the Board has jurisdiction over
6 you. Why five issues, as you've set them forth in the
7 pre-hearing report?

8 MR. TOURTELLOTTE: Well, the primary issue I
9 think, is issue number 1. I believe the regulations also
10 state that we should state at least one factual issue.
11 And issues 2, 3, 4 are factual issues, at least, and are
12 --

13 CHAIRMAN MOORE: Why are they relevant to
14 jurisdiction?

15 MR. TOURTELLOTTE: Well, jurisdiction is
16 realized, or exercised, through the actions of an agency
17 and through its staff or administrators. And therefore
18 the question is, what are those actions and how do those
19 actions fit within the scope of jurisdictional authority?

20 And I've broken those questions down: what are
21 the pattern of actions? And I allege a pattern for a very
22 specific reason. Is there --

23 CHAIRMAN MOORE: Why is it relevant? I just
24 fail to see it. You've been charged with two violations:
25 violation X and violation Y.

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1 MR. TOURTELLOTTE: Yes.

2 CHAIRMAN MOORE: And you've essentially admitted
3 those -- you have admitted those violations.

4 MR. TOURTELLOTTE: Well, we have admitted that
5 the facts exist, but we contend they are not violations.

6 CHAIRMAN MOORE: Only because of the legal
7 question --

8 MR. TOURTELLOTTE: Because of the jurisdiction.

9 CHAIRMAN MOORE: -- jurisdiction?

10 MR. TOURTELLOTTE: Yes.

11 CHAIRMAN MOORE: Okay, so the facts are not in
12 dispute. You've admitted to the violations and charged
13 the Agency doesn't have jurisdiction. So that leaves us
14 with the legal question.

15 MR. TOURTELLOTTE: Well, I have a difficult
16 problem with that, because if the Agency doesn't have
17 jurisdiction there are no violations, and we cannot --

18 CHAIRMAN MOORE: That would be true --

19 MR. TOURTELLOTTE: We cannot agree that there
20 were violations. We cannot -- I can agree -- as for
21 instance, the factual issue as stated by the staff -- I
22 can agree that on a certain data in a certain place, that
23 sights of a certain configuration were sold by the people
24 who are now 21st Century Technologies.

25 I can agree that on a certain date, or

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1 approximate number of dates, that they sold sources of
2 radioactive source materials, but I cannot agree that
3 those are violations.

4 CHAIRMAN MOORE: I understand. But admitting
5 those facts, that leaves solely the legal question of
6 whether the agency has jurisdiction. Correct?

7 MR. TOURTELLOTTE: Yes, but I don't think that
8 you can fully -- I don't think that question can be fully
9 understood unless the facts of the case are fully
10 explicated on the record.

11 CHAIRMAN MOORE: Why?

12 MR. TOURTELLOTTE: Well, I think it's important
13 to know what was done. I don't know how you can judge
14 that someone acts beyond their jurisdiction if you don't
15 look at the acts themselves.

16 CHAIRMAN MOORE: Mr. Tourtellotte, isn't the
17 issue fairly stated something like this: whether the
18 Atomic Energy Act of 1954, as amended, grants the NRC the
19 authority to impose and enforce conditions in a 10 CFR
20 Part 30 license that specify that the tritium source
21 supplier, gunsight manufacturer and model, and sealed
22 source configuration of tritium luminous gunsights
23 authorized to be possessed and distributed under the
24 license.

25 Isn't that fairly put, the jurisdictional issue?
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1 Whether the Agency has, pursuant to the conditions that
2 are already in the license, the authority to impose and
3 enforce those conditions? And you have stated that the
4 facts that have been charged by the staff, you can agree
5 to? You don't agree that they're violations because you
6 claim the Agency doesn't have that authority to impose a
7 sanction on you for doing that, or even putting them in
8 the license?

9 MR. TOURTELLOTTE: Your statement of the
10 contention -- I don't necessarily disagree with it. It
11 was rather long and complex and I would kind of want to
12 look at that before I would categorically say yes, that is
13 an issue. And I guess I still am of a mind that there is
14 the question that -- about whether the Agency has the
15 authority -- if that's really what you're saying -- under
16 the statute to place these regulations -- to have the
17 regulations and then to also enforce them.

18 The jurisdiction really goes to the act; it
19 doesn't go to the regulations. And --

20 CHAIRMAN MOORE: You've lost me.

21 MR. TOURTELLOTTE: Why have I lost -- I guess we
22 don't --

23 CHAIRMAN MOORE: What regulation is involved?
24 The authority the Agency acts under is derived from the
25 Atomic Energy Act --

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1 MR. TOURTELLOTTE: Yes.

2 CHAIRMAN MOORE: -- specifically, the staff has
3 cited you Section 81 of the Atomic Energy Act.

4 MR. TOURTELLOTTE: Correct.

5 CHAIRMAN MOORE: Either the Atomic Energy Act
6 gives the Agency that authority or it doesn't.

7 MR. TOURTELLOTTE: That is correct.

8 CHAIRMAN MOORE: The wording --

9 MR. TOURTELLOTTE: I'm only -- I guess I was
10 referring -- you made some reference to the regulations
11 and I'm not really sure --

12 CHAIRMAN MOORE: Well, your license --

13 MR. TOURTELLOTTE: -- what that reference --

14 CHAIRMAN MOORE: -- is a Part 30 license, is it
15 not?

16 MR. TOURTELLOTTE: Yes.

17 CHAIRMAN MOORE: A Part 30 materials license?

18 MR. TOURTELLOTTE: Yes.

19 CHAIRMAN MOORE: The question is simply whether
20 a Part 30 materials license can specify the types of
21 things that are set forth in your license.

22 MR. TOURTELLOTTE: I think that's -- that's
23 certainly acceptable.

24 CHAIRMAN MOORE: Why is that issue not amenable
25 to summary disposition?

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1 MR. TOURTELLOTTE: You mean on a legal briefing
2 of the issues? I suppose that's where you're going.
3 Well, I suppose that we can brief that legally, we can
4 brief that. I don't know how I'm going to write up the
5 factual support for that brief without inquiring into the
6 facts.

7 CHAIRMAN MOORE: You've admitted the facts are
8 as charged; you don't admit the violation. Rather, you
9 claim the Agency doesn't have that authority. What facts
10 are in dispute? For the jurisdictional question.

11 MR. TOURTELLOTTE: Yes, and maybe the issues
12 that I -- maybe there's more than one issue as stated and
13 there may be jurisdictional issue and there may be an
14 issue about arbitrary and capricious action on the part of
15 the staff.

16 CHAIRMAN MOORE: You haven't stated any issue,
17 either in your notice of -- I'm sorry, your hearing
18 request or in the pre-hearing report -- any issue of
19 arbitrary and capriciousness. Now, in your issue on
20 whether this was a level 3 offense and the appropriateness
21 of the penalty, it's -- obviously you're challenging the
22 appropriateness of the charge being a level 3 offense --
23 the staff's conclusion that these facts amount to a level
24 3 violation under their enforcement policy.

25 They either do or they don't, and your -- and

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1 the staff has conceded in the pre-hearing report that
2 those issues are litigable. But where does arbitrary and
3 -- presumably if the facts don't support it, one could
4 claim they're arbitrary and capricious, but it would seem
5 to me that you have a legal question on the jurisdiction
6 and the only other issue is whether the facts support --
7 the facts as charged support a level 3 violation and the
8 penalty.

9 MR. TOURTELLOTTE: I can certainly understand
10 the direction you're coming from. I approached it a
11 little bit differently, and I suppose that in my approach
12 what I assumed -- which may not have been an appropriate
13 assumption for me -- was that there were factual issues
14 that were related to the exercise of jurisdiction.

15 In other words, when an investigator
16 investigates a matter of compliance which is beyond the
17 jurisdiction of the Agency to require, it seems to me that
18 that -- at least it appeared to me that that had some
19 relevance about the way jurisdiction was exercised. And I
20 simply -- I looked at it as a factual as well as a legal
21 issue.

22 My view was that if all of those things -- the
23 staff did a number of things when they were conducting the
24 investigation, when they were doing the license review --
25 all of which I would have assumed, if I were to develop

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1 what I thought was a factual basis for the jurisdictional
2 issue, would have also demonstrated that the staff acted
3 in an arbitrary and capricious manner and without any kind
4 of rational basis.

5 And so I would have to confess that if we were
6 to go the route where we briefed the jurisdictional issues
7 separately as solely a legal issue, then what I would want
8 to do is perhaps --

9 ADMINISTRATIVE JUDGE RUBENSTEIN: Don't fade out
10 on me.

11 MR. TOURTELLOTTE: -- perhaps amend my statement
12 of a contentions to allege that the actions underlying
13 enforcement action were arbitrary and capricious and
14 without rational basis.

15 CHAIRMAN MOORE: If there's jurisdiction though,
16 doesn't that question go away? If we decide there's
17 jurisdiction, for instance, that the Agency has this
18 authority, then are you still contending their actions
19 were arbitrary and capricious if they have the authority
20 to specify and enforce what manufacturer that you receive
21 your sealed sources from?

22 ADMINISTRATIVE JUDGE RUBENSTEIN: Bob, don't
23 fade out on me.

24 CHAIRMAN MOORE: Sorry, Judge Rubenstein. Mr.
25 Tourtellotte?

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1 MR. TOURTELLOTTE: Do you want to repeat that
2 for the colleague?

3 CHAIRMAN MOORE: If --, for the sake of
4 argument, were to find the Agency has jurisdiction, has
5 the authority to impose and enforce the conditions in your
6 client's license, does the -- what you're claiming, the
7 arbitrariness and capriciousness of the staff's action go
8 away, or would you still contend that they were acting
9 arbitrarily and capricious, even though within their
10 power?

11 MR. TOURTELLOTTE: Yes, I would. So I don't
12 think that would necessarily go away.

13 CHAIRMAN MOORE: Moving to the issue of the
14 appropriateness of --

15 MR. TOURTELLOTTE: I might also add -- if I
16 might add to that -- even though they're acting within
17 their power, if they act without a rational basis then I
18 believe that there is a legitimate complaint that the
19 licensee would have.

20 CHAIRMAN MOORE: If they have the authority to
21 specify and enforce the conditions in your client's
22 license, how is that arbitrary and capricious to enforce
23 those conditions?

24 MR. TOURTELLOTTE: Well, I think there's --
25 substantively that may be a valid question, but there are

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1 also procedural questions I think that also may affect the
2 outcome of the decision of the Board.

3 CHAIRMAN MOORE: Moving to your second issue,
4 the appropriateness of the severity level 3 charge and
5 ensuing penalty as mitigated, is that in your view, a
6 factual question?

7 MR. TOURTELLOTTE: I think the same, the same
8 set of facts that pertain to what the staff did and the
9 way that they did it -- their lack of rational basis, the
10 very, very weak nature of the case for what they call,
11 regulatory concern/compliance -- I think would be still a
12 part of the record in mitigating that amount even further
13 than it has been mitigated.

14 In other words, reduction from 7500 to 2500,
15 conceivably could be reduced to a nominal one dollar.
16 Even if the Board were to hold that there is jurisdiction
17 and if the Board were to hold that yes, indeed, there is a
18 violation, it could be reduced to a single dollar.

19 CHAIRMAN MOORE: Mr. Tourtellotte, one thing
20 that is not in either the notice of violation or in your
21 request for a hearing or the staff's Order, is any mention
22 of the past history of your client. Is that an
23 appropriate thing that will enter into this if this is
24 opened up? Haven't numerous enforcement actions been
25 taken against your client?

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1 MR. TOURTELLOTTE: Well, there is a major change
2 in ownership of the company. IWI had enforcement actions
3 taken against it under a previous owner. There are no
4 other actions as I know it, under the current owners. But
5 it is true, there were some actions, and I think actually
6 they were dismissed. But under the previous owner -- the
7 previous owner was kept on after the current owners
8 purchased the company, and was subsequently relieved of
9 his duties for reasons that current management --

10 CHAIRMAN MOORE: So none of the principals of
11 past enforcement actions by the staff are still involved
12 with the license?

13 MR. TOURTELLOTTE: Not to my -- that's my
14 understanding right now.

15 ADMINISTRATIVE JUDGE KLINE: Mr. Tourtellotte, I
16 want to direct your attention to issue number 4. That
17 appears to be raising the issue that the NRC might lack
18 jurisdiction because there's no reasonable relationship to
19 public health and safety. Is this, in your mind, an
20 invitation to the Board to rule on a below-regulatory
21 concern kind of argument? Or is it your intention to
22 raise that kind of argument?

23 MR. TOURTELLOTTE: Well, certainly I didn't
24 expect to raise below-regulatory concern in that term, but
25 indeed, as that --

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1 ADMINISTRATIVE JUDGE KLINE: The functional
2 equivalent --

3 MR. TOURTELLOTTE: -- because of all of the
4 ramifications of all the things that happened to that.
5 But indeed, it is -- it would have been if you will, a
6 legitimate argument for below-regulatory concern, which
7 was never really raised.

8 And that is, that the limits of jurisdiction of
9 the Agency are protection of public health and radioactive
10 -- between public health and safety of radioactive
11 hazards, and perhaps that question should have had the
12 words of radioactive hazards, because if there -- it seems
13 to me that clearly that's what the Act is about. It's
14 about protection of public health and safety relative to
15 radioactive hazards, and if it isn't that, then there is
16 no jurisdiction.

17 ADMINISTRATIVE JUDGE KLINE: Can you give us --

18 MR. TOURTELLOTTE: There is no regulatory
19 concern, if you will.

20 ADMINISTRATIVE JUDGE KLINE: Can you give us any
21 authority for the proposition that NRC has relinquished
22 jurisdiction over radioactive material because of its low
23 hazard?

24 MR. TOURTELLOTTE: I think there are a lot of
25 radioactive materials out there that are not regulated by

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1 the NRC.

2 ADMINISTRATIVE JUDGE KLINE: Well, I'm
3 interested in --

4 MR. TOURTELLOTTE: Human beings.

5 ADMINISTRATIVE JUDGE KLINE: I understand
6 there's --

7 MR. TOURTELLOTTE: Human beings are radioactive.
8 They're not regulated.

9 ADMINISTRATIVE JUDGE KLINE: Yes, I understand
10 that. I'm talking about byproduct material. Is there any
11 authority standing for the proposition that within NRC
12 practice, NRC relinquishes jurisdiction over byproduct
13 material because of a perceived low hazard of a specific
14 material?

15 MR. TOURTELLOTTE: I don't think there are any
16 cases that are in line with what I've alleged. I find no
17 cases on this kind of jurisdictional issue having ever
18 been raised before.

19 ADMINISTRATIVE JUDGE KLINE: Okay, thank you.

20 CHAIRMAN MOORE: Mr. Tourtellotte, are you
21 familiar with Section 81 of the Atomic Energy Act?

22 MR. TOURTELLOTTE: Well --

23 CHAIRMAN MOORE: And how do you deal with the
24 portion of it that talks about, "the Commissioner shall
25 not permit the distribution of any byproduct material to

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1 any license and shall recall or order the recall of any
2 distributed material from any license who is not equipped
3 to observe or who fails to observe such safety standards
4 to protect health as may be established by the Commission,
5 or who uses such material in violation of law or
6 regulation of the Commission, or in a manner other than as
7 disclosed in the application therefore"?

8 How do you in your argument, deal with that
9 explicit, statutory authority in the Atomic Energy Act?

10 MR. TOURTELLOTTE: Well, I think you have to
11 view that section in the context of the total Act. I
12 don't think the Section in and of itself or dissecting the
13 section is going to get you a true meaning of what that
14 Section 81 is about.

15 The fact is is that, the Atomic Energy Act only
16 exists -- only has relevance to protection of public
17 health and safety from radioactive hazards. There's also
18 common defense and security but we'll put that aside for a
19 moment. Clearly this has nothing to do with common
20 defense and security.

21 What I think you -- my argument is, is that the
22 overriding concern is protection of the public against
23 radioactive hazards. And I would even invite your
24 attention to Appendix C, to Part 2 where it says in the
25 first two paragraphs of roman numeral II-A: The NRC's

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1 enforcement jurisdiction is drawn from the Atomic Energy
2 Act of 1954 as amended, and the Energy Reorganization Act
3 of 1974 as amended.

4 Second paragraph, Section 161 of the Atomic
5 Energy Act authorizes the NRC to conduct inspections and
6 investigations to issue orders as may be necessary or
7 desirable to promote the common defense and security, or
8 to protect health or minimize danger to life or property.

9 And that kind of mandate is throughout the Act,
10 and it's always for the purpose of protecting public
11 health and safety against radioactive hazard.

12 Now, when you look at what the NRC is entitled
13 to do -- yes they can regulate manufacturers, they can
14 regulate possessions, they can regulate use -- but the
15 question you have to ask yourself is, is that a plenary
16 power? And my answer is, it is not a plenary power
17 because there are certain things that you cannot regulate
18 that the NRC does not regulate relative to, for instance,
19 manufacture.

20 If you take the term manufacturing,
21 individually, and you consider all of the ramifications in
22 manufacturing, there are for instance, securities that are
23 issued. NRC does not regulate securities. There are laws
24 for safety -- as a matter of fact, we don't even have
25 plenary powers over safety because there are safety rules

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1 -- that we have nothing -- I'm sorry for saying "we" --
2 that the NRC has no jurisdiction over at all.

3 For instance, the protection of worker safety
4 that have nothing to do with radiological safety.
5 Possession and use I think, are conditioned in the same
6 way. They're all conditioned by the fact that it has to
7 be reasonably related to the protection of public health
8 and safety insofar as radioactive material.

9 CHAIRMAN MOORE: Why is this not -- although
10 this goes directly to the merits, the staff, in their
11 notice of violation and the appendix thereto, set forth
12 the reasons why, as a regulatory matter, they need this
13 information to be able to keep track of the material that
14 they regulate. And that's the kind of argument that I'm
15 sure the staff is going to fill out for us in future
16 arguments. But --

17 MR. TOURTELLOTTE: But see, I'm fully aware of
18 course, that in that document they set out those things,
19 but you know, if it's a matter of going through the
20 document and answering point-by-point what they have said,
21 I would say, there again is an indication of why the facts
22 are important.

23 Because what they are doing, they're really --
24 in most of what I was able to observe -- is they are
25 pleading conclusions; they are not -- they do not have a

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1 rational basis.

2 CHAIRMAN MOORE: In light of the amount of money
3 that's involved now with the mitigation and the penalty,
4 and the relatively inexpensive amount of money it would
5 cost to just seek a simple license amendment, why are you
6 not just seeking to amend your license to specify the full
7 range of suppliers and applications? And this is a
8 relatively ministerial, routine matter. Why, with the
9 amount of money involved, are the handstands being
10 performed?

11 MR. TOURTELLOTTE: First, with regard to the
12 money, you're very close to right when you mention pro
13 bono. They don't have the money to afford me or anybody
14 else, and I'm here as a matter of principle and not for
15 any kind of remuneration.

16 Regarding the, why not amend the license, it's
17 fine. I have actually talked about that and I have
18 suggested that if the staff were to work with me to make
19 the license performance-based and to either not have a
20 fine or make it a nominal amount, that this problem would
21 go away. And I think the license could be turned into a
22 performance-based license quite -- not totally easily, but
23 I think we could work to do that.

24 CHAIRMAN MOORE: Why does it need to be
25 performance-based? Just specify all your sources and

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1 specify all the applications?

2 MR. TOURTELLOTTE: Well, because the nature --

3 CHAIRMAN MOORE: It is a matter of auditing.
4 They can check up on you to make sure you're doing what
5 you're supposed to do.

6 MR. TOURTELLOTTE: Well, it may be surprising
7 but this technology changes frequently, and people who are
8 in the, for instance the gun or gunsight business,
9 frequently come out with different configurations of
10 sights. If you prescribe the configuration of the sight
11 in the license and one is held to a standard that you
12 cannot change the configuration of a sight without a
13 license from it -- and it takes a year -- then what you're
14 putting yourself at a distinct disadvantage for other
15 competitors.

16 And in fact, the license amendment that was
17 applied for here was not granted for nearly a year. And
18 that impedes the good flow of commerce in my view --
19 actually has an anti-competitive effect if you look at it
20 on an international basis.

21 CHAIRMAN MOORE: Judge Rubenstein, do you have
22 any questions for Mr. Tourtellotte?

23 ADMINISTRATIVE JUDGE RUBENSTEIN: Yes. In
24 listening to the summary and the comments, one of the
25 questions that comes to mind on the authority to regulate

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1 is -- and I see this almost as a moot issue already -- the
2 licensee applied for the license, paid the fee, submitted
3 the draft and got it approved, and then submitted to the
4 inspections. So I find it a little hard that they didn't
5 recognize jurisdiction.

6 In looking at the Atomic Energy Act and your
7 reading of the pertinent section, I thought that was
8 authoritative, at least from one side of the argument.
9 And I saw no challenge, particularly to the rules and
10 regulations that flowed from the authority under the
11 Atomic Energy Act. And what I did hear was a shift in
12 emphasis to this specific case where the rules and
13 regulations apply properly.

14 I haven't heard any basis for the contention
15 that the selection of the severity level, or the penalty
16 for that level, or the process of mitigation of that civil
17 penalty was in question, other than in general terms they
18 acted improperly.

19 Specifically, what leaves me a little open to
20 thought is, is this a challenge to the severity of the
21 license variation, or to the safety implications of the
22 violation, or both? And in any rewriting, one would have
23 to address these issues. That's the only thing I have.

24 MR. TOURTELLOTT: Regarding the jurisdiction
25 is, I think -- certainly the legal members of the Board

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1 will understand -- jurisdiction is a very complex issue
2 and these people who are out there drilling holes in
3 gunsights and putting little vials of tritium don't know
4 anything about jurisdiction. They do what they are told,
5 and what they were told to do is to file an amendment,
6 they were told how to file the amendment, and they filed
7 the amendment.

8 I would hasten to add, if the jurisdiction does
9 not exist, it doesn't exist as the Board indicated. And
10 if it, simply by agreeing to file the license and to
11 accept a license does not really, in and of itself, confer
12 jurisdiction. Jurisdiction can only be conferred by the
13 Constitution or by an organic act.

14 Regarding the issue of whether this is a
15 challenge to the severity or the writing of the
16 regulation, this challenge to the severity is really an
17 alternative. As I indicated in the pre-hearing report,
18 licensee's position is that if indeed the Board finds
19 favorably on the jurisdictional issue, the severity issue
20 never really comes up.

21 On the other hand, the record has to be
22 developed at some point in time to permit the licensee to
23 at least try to establish its case why even this \$2500 is
24 still too severe.

25 As far as the writing of the regulations, I

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1 don't really know of anything specifically in the
2 regulations themselves that refer to the kind of factual
3 situation we have here, vis-a-vis, configuration of the
4 sights and where one buys tritium, a source of commerce.

5 ADMINISTRATIVE JUDGE RUBENSTEIN: That's why the
6 license written by the applicant is so important. Because
7 that is what really governs in this area.

8 MR. TOURTELLOTTE: Well, I would agree that the
9 license is certainly important, but I think also, we know
10 that the license is not written solely by the licensee.
11 The licensee submits a license or license amendment. They
12 usually do it with the advice of the staff, and after they
13 submit it the staff usually requires them to revise it.

14 Now, if the staff had a total hands-off attitude
15 I would say, it's really important as to what the licensee
16 does or doesn't do. But once the staff has undertaken to
17 advise a licensee that the manner in which they submitted
18 the license is not adequate and that they have to make to
19 changes, then the staff has a responsibility to be
20 forthright about everything in regard to that license.
21 And that license is not just a product of the licensee;
22 it's a product of the licensee and the staff.

23 CHAIRMAN MOORE: Ms. Marco, what does the staff
24 have to say about the jurisdictional issue?

25 MS. MARCO: Well the staff --
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1 CHAIRMAN MOORE: Is there one issue or are there
2 five?

3 MS. MARCO: Well, written there are five, and
4 the staff objects to the way that they are written. And
5 in particular, the staff considers that -- well, the first
6 issue is whether the pattern of NRC actions underlying the
7 Order and the Order itself, are beyond NRC's jurisdiction
8 is vague, and it's unclear what is meant by the pattern of
9 NRC actions, and it's unclear what the licensee's argument
10 really is in this regard from the words of these issues.

11 The staff has to have some sort of indication or
12 notice of what the licensee is contesting in order to
13 refute it. Now, if the licensee is raising the conduct of
14 the staff -- which it seems like it may be doing here, and
15 the staff's offices -- that those issues are really not
16 appropriate for this proceeding. They're just not
17 material to the basic issue of whether the licensee was in
18 violation of a condition of its license.

19 And the primary focus in this proceeding is
20 really on the licensee and it's not on the staff. And for
21 this reason the two factual issues supporting the first
22 issue about the pattern of NRC actions, these factual
23 issues are, the pattern of NRC actions taken by the Staff
24 and Licensing Investigative and Enforcement Divisions, and
25 three, were these actions within the scope of authority

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1 granted to the staff by the AEA? These are simply not
2 appropriate here.

3 Now as well -- I also understand that the issue
4 could be considered to consist of a challenge to the
5 license conditions, and the licensee stated that the staff
6 did not have authority to issue the license conditions.
7 The staff believes that this issue falls outside of this
8 proceeding, and that it's an impermissible attack on the
9 license conditions.

10 CHAIRMAN MOORE: Wait a minute. How can a
11 challenge to the authority of the Agency to charge someone
12 with a violation be outside of this proceeding?

13 MS. MARCO: Because the Commission takes great
14 importance -- considers it to be --

15 CHAIRMAN MOORE: Off the --

16 MS. MARCO: I'm sorry. The Commission places
17 great importance on complying with the terms of its -- the
18 licensees must comply with the terms of their license.
19 And I have several cases of that.

20 CHAIRMAN MOORE: We're going to -- the primary
21 challenge of the licensee is to the authority of the
22 Agency to put those licensed conditions in its license.
23 And you've not charged him with violating those
24 conditions. How else can a licensee raise such an issue
25 if the staff's position were to be upheld that that's

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1 outside the bounds of an enforcement proceeding?

2 MS. MARCO: Well, it's within the bounds,
3 possibly, of an amendment license proceeding. If --

4 CHAIRMAN MOORE: Well, wait a minute --

5 MS. MARCO: -- they were to request to have the
6 license --

7 CHAIRMAN MOORE: The fees being \$2500 -- you're
8 reaching your hand in his pocket taking \$2500 and he's
9 saying, no, you can't have my \$2500 because your hand
10 doesn't belong in my pocket. That can't be raised in an
11 amendment proceeding because he's still out \$2500.

12 MS. MARCO: He should have been complying with
13 the terms of his license and then come in for an
14 amendment.

15 CHAIRMAN MOORE: Completely circular argument,
16 Ms. Marco; try again. How can it be outside the bounds of
17 an enforcement proceeding to claim the ultimate authority
18 of the Agency, challenge the ultimate authority of the
19 Agency?

20 MS. MARCO: Well, also the licensee is not
21 permitted to challenge the regulations, and I hear that
22 that is also -- sounds like that is a challenge that --

23 CHAIRMAN MOORE: The challenge here is that the
24 Atomic Energy Act doesn't give the staff the authority to
25 do what it did by putting that licensed condition in his

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1 license.

2 MS. MARCO: We have license -- we have
3 regulations in Part 32 that address the issue as to what
4 is appropriate, what the staff must consider in the
5 licenses.

6 CHAIRMAN MOORE: So it's the staff's position
7 that a licensee in an enforcement proceeding cannot
8 challenge the jurisdiction of the Agency over the
9 licensee?

10 MS. MARCO: That's correct.

11 CHAIRMAN MOORE: How, pray tell, would a
12 licensee ever challenge the authority of the Agency if you
13 can't do it in an enforcement proceeding?

14 MS. MARCO: It may not be appropriate unless
15 there's a rulemaking. The licensee could come in for a
16 petition for rulemaking --

17 CHAIRMAN MOORE: A rulemaking doesn't harm the
18 licensee; your hand in his pocket for \$2500 does.

19 ADMINISTRATIVE JUDGE RUBENSTEIN: But he can
20 challenge the material facts of the penalty, of the
21 violation, the severity of the penalty, and the nature of
22 the considerations which went into mitigation. I believe
23 there's a table in the regulations which deal with these
24 kinds of penalties.

25 MS. MARCO: Yes, and the staff agrees that those
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1 are appropriate issues for the proceeding.

2 CHAIRMAN MOORE: But the staff claim is that one
3 cannot challenge the jurisdiction of the Agency --

4 MS. MARCO: That is correct.

5 CHAIRMAN MOORE: -- over an applicant?

6 MS. MARCO: Yes.

7 CHAIRMAN MOORE: Can you cite me some authority
8 for that?

9 MS. MARCO: Okay.

10 CHAIRMAN MOORE: Where that issue was directly
11 addressed?

12 MS. MARCO: All right. Well, we have a
13 decision, a Commission decision in American Nuclear
14 Corporation. This is CLI-8623. And the primary -- the
15 Commission stated in that case that case that one of the
16 fundamental principles of Administrative law is that its
17 rules are not subject to attack in adjudicatory
18 proceedings.

19 And this case was actually a case involving the
20 staff's imposition of license conditions on the licenses
21 of 11 uranium mill owners. And the licensees in that case
22 challenged that the NRC was acting contrary to the Atomic
23 Energy Act in doing what it did. And the Commission
24 rejected this claim and stated that rulemaking was the
25 appropriate place to challenge -- to make this challenge,

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1 and not as a collateral attack.

2 CHAIRMAN MOORE: Excuse me. How is direct
3 challenge to jurisdiction over a collateral attack? It's
4 a direct attack.

5 MS. MARCO: Well, it may be a direct attack,
6 then.

7 CHAIRMAN MOORE: So it is the staff's position
8 that the only time a licensee can challenge the
9 jurisdiction of the Agency over him is through a
10 rulemaking?

11 MS. MARCO: That is correct.

12 CHAIRMAN MOORE: That's the black letter law
13 that you're espousing?

14 MS. MARCO: Yes, that is exactly it.

15 ADMINISTRATIVE JUDGE RUBENSTEIN: As I
16 understood it.

17 CHAIRMAN MOORE: Okay. Do you disagree with Mr.
18 Tourtellotte as to the questions he raises about the
19 severity level 3?

20 MS. MARCO: Yes, the staff did agree that issues
21 6 and 7 that he proposed are appropriate issues for this
22 proceeding. The staff, when it considered these issues
23 appropriate, understood the issue to be based on the
24 licensee's conduct and it was outside -- it has nothing to
25 do with the staff's conduct. And if that's what I hear

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1 the issue to now be, then the staff would have to object
2 to it.

3 CHAIRMAN MOORE: I'm sorry, I don't think I
4 understood you.

5 MS. MARCO: Okay.

6 CHAIRMAN MOORE: You're not suggesting -- or are
7 you suggesting rather, that the licensee may not challenge
8 the appropriateness of the severity level 3 charge and the
9 fine?

10 MS. MARCO: Oh no, that is appropriate; that is
11 quite appropriate for this proceeding.

12 MR. TOURTELLOTTE: If I may, to rephrase, I
13 think what I understand counsel to be saying is that while
14 we can challenge that, we can't raise any issue about what
15 the staff's conduct was in that regard. We can argue that
16 it should be less as long as we don't criticize the staff.

17 ADMINISTRATIVE JUDGE RUBENSTEIN: The staff's
18 rationale and basis for it is open. I wouldn't put it as
19 a criticism of the staff, I would view it as a different
20 interpretation of the facts.

21 ADMINISTRATIVE JUDGE KLINE: Ms. Marco, would
22 you address Mr. Tourtellotte's argument that the staff
23 lacks jurisdiction to regulate other things that the
24 licensee does -- for example, worker safety or general
25 safety not related to radioactive materials -- and do that

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1 in connection with his issue number 4 where he appears to
2 be alleging that there is some level of hazard to public
3 health and safety below which we would also lack
4 jurisdiction?

5 MS. MARCO: Okay. I believe that would start
6 with the Atomic Energy Act, and the Atomic Energy Act has
7 an overarching, general goal of protection of the public
8 health and safety, and we would agree to that; that's
9 completely true.

10 The AEA however, it doesn't say that each
11 individual license condition of every single license must
12 have a significant, high level health and safety concern.
13 But the composite of activities authorized by the AEA go
14 to the public health and safety, and there are some
15 aspects that are more, some aspects that are less, but
16 overall it's for the public health and safety.

17 Now, Section 81 of the Atomic Energy Act was
18 also in furtherance of this goal, and this specifies the
19 regulation of byproduct material. And you read some of
20 Section 81 of the Atomic Energy Act and it specifies the
21 kinds of matters, that if they are contained in the
22 license are in furtherance of the public health and
23 safety.

24 But it leaves it to the Commission to decide
25 whether it should be a license or a specific license, what

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1 kind of users, what kind of uses of the product, and
2 license conditions go in there. And based on that the
3 Commission promulgated Section 32, and that's how it
4 decides and that's where it made its decision on what
5 matters to regulate.

6 And this 32 says what information it needs from
7 licensees, and then it says what it bases its decision on
8 and the safety criteria. And then that's how 21st Century
9 got its license conditions, as a result of that authority.

10 CHAIRMAN MOORE: Ms. Marco, why, in answer to
11 Judge Kline's question, do you start with the Atomic
12 Energy Act, and in answer to the basic jurisdictional
13 issue that the licensee raises, you say it can't be
14 raised, when his challenge is the Atomic Energy Act
15 doesn't give the Agency authority to do what you're
16 claiming?

17 MS. MARCO: Because there is a regulation under
18 Part 32 that already addresses this. This has been
19 through rulemaking and the Commission has already decided
20 that these things -- this has to do --

21 CHAIRMAN MOORE: Just for the sake of argument,
22 assume the client wasn't in existence at the time of that
23 rulemaking. How could they possibly have raised that
24 jurisdictional challenge?

25 MS. MARCO: Not at the time of that rulemaking;
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1 however, they could still request rulemaking even today.

2 ADMINISTRATIVE JUDGE RUBENSTEIN: You can
3 petition anytime --

4 CHAIRMAN MOORE: Assume that was done and his
5 rulemaking was denied and then you have an enforcement
6 action. Are you saying, that's tough?

7 MS. MARCO: That is, yes.

8 CHAIRMAN MOORE: Fine. Thank you. Do you have
9 anything else? What is it?

10 ADMINISTRATIVE JUDGE KLINE: Mr. Tourtellotte
11 indicated that the Atomic Energy Act generally refers to
12 the purpose of regulation being in the interest of
13 protecting public health and safety. Now, his argument is
14 that as a factual matter, there are certain elements here
15 that do not protect health and safety because of a weak
16 linkage, let us say. I'm referring again, or
17 reinterpreting his subparagraph 4.

18 Now, is there some reason why he would be
19 prohibited from raising that issue in connection with a
20 jurisdictional issue, i.e., that there is some level of
21 threat to public health and safety below which NRC's
22 jurisdiction disappears?

23 MS. MARCO: Again, this would be a challenge to
24 the license condition, and --

25 ADMINISTRATIVE JUDGE KLINE: Is it your view
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1 that anytime byproduct material is involved, no matter how
2 low, just the simple presence of byproduct material
3 confers jurisdiction?

4 MS. MARCO: Yes, if the Agency has regulated
5 this, correct.

6 ADMINISTRATIVE JUDGE KLINE: Okay.

7 CHAIRMAN MOORE: Now wait a minute, Ms. Marco.
8 That's a very interesting point. The Agency can
9 "regulate" through specific Orders, can it not?

10 MS. MARCO: Yes, it can.

11 CHAIRMAN MOORE: So forget 10 CFR as if it
12 doesn't exist, and the Agency has a specific order against
13 a licensee, and the licensee says, whoa, you don't have
14 the authority under the Atomic Energy Act to issue that
15 order against me. What's the staff's position; that they
16 can't challenge the Agency's jurisdiction in a like
17 enforcement proceeding?

18 MS. MARCO: That's correct.

19 CHAIRMAN MOORE: And where would the licensee
20 raise that challenge to the Agency's jurisdiction where
21 there has been no rulemaking, there are no regulations, it
22 was a specific Order?

23 MS. MARCO: They would have to seek a rulemaking
24 to allow that.

25 CHAIRMAN MOORE: Thank you. Let's move on and
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1 talk scheduling.

2 MR. TOURTELLOTTE: Might I respond briefly to
3 the CLI-8623 issue, because I think it's a little bit
4 confusing. What really that rule is about is that in
5 proceedings that are before the Agency, under a set of
6 regulations and pursuant to a particular regulation, the
7 party may not challenge that regulation to the Agency,
8 that that regulation somehow isn't what it should be.

9 That is distinctly different from what I am
10 talking about which is not -- I am not challenging the
11 NRC's regulations for application in an administrative
12 proceeding. What I'm challenging is their authority to
13 issue those regulations -- or to take regulatory actions
14 for which they have no organic basis in the law to do.

15 And by analogy, simply -- and to make it
16 ridiculous -- but if the NRC were to make a rule that no
17 one in the NRC could ever be convicted of reckless
18 driving, that would not make the fact that they have that
19 regulation on the books something that would say, well, if
20 you want to challenge that the only way you can do that is
21 ask for another rulemaking. That's not the case.

22 ADMINISTRATIVE JUDGE KLINE: Well, Mr.
23 Tourtellotte, that's the reason I pursued that question
24 with Ms. Marco, because I don't think anyone would contest
25 that any possible NRC rule that had nothing whatever to do

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1 with byproduct material would be outside of its
2 jurisdiction. The question is, once byproduct material is
3 in the mix, then doesn't -- or why doesn't jurisdiction
4 automatically follow?

5 MR. TOURTELLOTTE: Yes, I think that's an
6 important question too, and if you will, I would sort of
7 move to some of the facts of this particular case to
8 demonstrate the point.

9 ADMINISTRATIVE JUDGE KLINE: Well, I --

10 MR. TOURTELLOTTE: Let me -- the configuration
11 of the sight is -- I don't know if everyone has ever shot
12 a weapon here or not -- but there is a little notch in the
13 middle and on either side of that notch there's a space.
14 They drill a hole, put some tritium in there, drill a hole
15 in the front sight. Then you line up those dots and
16 you're able to see a target in low light when you would
17 not otherwise see that target.

18 One of the things that evidence would show as
19 far as the factual part of this goes, is that the staff
20 said, we think you ought to move that dot over to the left
21 1/1000th of an inch. My view is, the staff doesn't have
22 any business telling them where to put that dot as long as
23 that dot doesn't have -- as long as the way it is placed
24 in the sight has the characteristics of reasonably
25 protecting the public health and safety.

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1 For that matter, it doesn't make any difference
2 whether this sight is a half-inch wide, or an inch wide,
3 or three-quarters of an inch wide, or a quarter-of-an-inch
4 wide. The configuration has nothing to do with the use of
5 the byproduct material. It is how that byproduct material
6 is secured against -- for protection of public health and
7 safety -- and that is something that I believe the NRC can
8 regulate.

9 I'm not taking the position that they can't
10 regulate byproduct material. The question is, what are
11 the reasonable limits for regulating byproduct material
12 and --

13 ADMINISTRATIVE JUDGE KLINE: Okay, that's --

14 MR. TOURTELLOTTE: -- I'm saying whether the
15 sight looks like this or looks like this, whether it's
16 triangular or rectangular or trapezoid, is of no real
17 concern to the Agency; has nothing to do with public
18 health and safety.

19 ADMINISTRATIVE JUDGE KLINE: That's what I've
20 been trying to probe for because I had thought that you
21 were going to ask the Board to define some level of public
22 health and safety and then, below which there would be no
23 jurisdiction and above which there would be. But --

24 MR. TOURTELLOTTE: No.

25 ADMINISTRATIVE JUDGE KLINE: -- now I see, I
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1 think for the first time, that it's -- you're arranging
2 something different.

3 MR. TOURTELLOTTE: No, I'm not -- I don't think
4 the Board is ever going to have to say, what is a
5 reasonable level. But I can tell you also, you know, as
6 not a proffer of evidence but where I think the case could
7 go. You could take the tritium that they have and glue it
8 to the top of a sight and it still wouldn't adversely
9 affect the public health and safety. You can smash all
10 three of them at the same time on the same weapon and it's
11 still not going to materially affect the public health and
12 safety.

13 Why is it the staff has to occupy its time and
14 spend its budget on telling people where they put the dot
15 in the sight? Their business is not manufacturing sights.
16 They have no business telling commerce what to do. They
17 have business assuring that that byproduct material is
18 used in a manner that is reasonably designed to protect
19 public health and safety. Once they have that assurance,
20 that's all they need.

21 To use the other point which is raised in the
22 complaint, they talk about the source material. They got
23 source material from someone in South Africa that is
24 encased exactly like the material they were getting from
25 Canada.

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1 MS. MARCO: Well, Your Honor, this is all my
2 point. That if the licensee does not like what's in the
3 license now he can come in for an amendment or he can ask
4 for a specific exemption. But absent that, can't raise
5 that challenge here.

6 MR. TOURTELLOTTE: It is true we can come in for
7 another license, but that is not going to wipe out the
8 fact that we got \$2500 hanging over our head, when in
9 fact, \$2500 shouldn't be there because the staff didn't
10 have any business regulating in the manner that it
11 regulated in the first place.

12 And to let me finish this other point that I was
13 making relative to South Africa, there are some very, very
14 interesting facts here. One is that the source in Canada
15 actually, contrary to the NAFTA Agreement and contrary to
16 the Antitrust Bill, various acts, actually went into the
17 sight business itself, raised the price of an individual
18 vial from 75 cents to \$10.75, forcing this American
19 company to go to South Africa to find a source of tritium.

20 When they found the source of tritium for a
21 reasonable price and used it in their product, my position
22 is, it doesn't make any difference -- it shouldn't make
23 any difference to the NRC where that product comes from.
24 The only issue is, is that product reasonably encapsulated
25 in a way to protect the public health and safety?

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1 ADMINISTRATIVE JUDGE KLINE: But that question,
2 reasonably encapsulated, isn't that something NRC would
3 have jurisdiction over?

4 MR. TOURTELLOTTE: It may; it may.

5 ADMINISTRATIVE JUDGE KLINE: I mean, it would
6 seem --

7 MR. TOURTELLOTTE: But if the standard -- if
8 they're encapsulated in exactly the same way as they are
9 from Canada, what difference does it make? Tritium is H₃
10 whether it's in Canada or it's in South Africa. When --

11 ADMINISTRATIVE JUDGE KLINE: What I'm getting at
12 is --

13 MR. TOURTELLOTTE: -- it's in the same amounts
14 and the same, -- it's in the same amounts, it's
15 encapsulated in the same way, there is no difference in
16 terms of effect on the public health and safety --

17 ADMINISTRATIVE JUDGE KLINE: It seems to me
18 there is a circularity growing in here because the issue,
19 if you would presume they are identically encapsulated you
20 might have a valid argument. But this is precisely what I
21 think the jurisdiction the staff has used to determine;
22 that is, that's the open question, isn't it? Are they
23 identically encapsulated --

24 MS. MARCO: That's correct.

25 ADMINISTRATIVE JUDGE KLINE: -- and doesn't the
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1 staff have the authority to make that determination, and
2 wouldn't it do so, say under a license amendment or an
3 application for license amendment?

4 MR. TOURTELLOTTE: My answer to that is, there's
5 another factual issue that's important here. I think the
6 evidence will show, the record would show if the factual
7 case is put on, is that the NRC sent staff to that plant
8 in South Africa and they knew full well how they were
9 encapsulated, so they didn't have any real question about
10 it.

11 CHAIRMAN MOORE: Well, let's turn to scheduling.
12 Again, I would reiterate that the better part of
13 discretion for both parties would be that you renew your
14 settlement discussions. But failing the reaching of an
15 agreement to settle this matter, we will issue an Order
16 shortly -- and it won't be next week because this member
17 of the Board is leaving momentarily. When I get back and
18 we can consult one another we will issue an Order setting
19 out our view of the issues, and tentatively I --

20 ADMINISTRATIVE JUDGE RUBENSTEIN: Judge Moore?

21 CHAIRMAN MOORE: Yes, Judge Rubenstein?

22 ADMINISTRATIVE JUDGE RUBENSTEIN: I have a
23 question.

24 CHAIRMAN MOORE: Go ahead.

25 ADMINISTRATIVE JUDGE RUBENSTEIN: In talk about,
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1 is it the sense of the two parties that scheduling another
2 settlement discussion or another joint pre-hearing report
3 would be a worthwhile exercise?

4 CHAIRMAN MOORE: We can inquire.

5 ADMINISTRATIVE JUDGE RUBENSTEIN: That's what
6 I'm inquiring.

7 CHAIRMAN MOORE: Would further settlement
8 discussions likely bear fruit? Mr. Tourtellotte?

9 MR. TOURTELLOTTE: Well, the only thing that I'm
10 asking is that we reconfigure the license to a
11 performance-based license and that the fine either be
12 dismissed or be more nominal than it is --

13 CHAIRMAN MOORE: Well, Mr. Tourtellotte --

14 MR. TOURTELLOTTE: -- and what --

15 CHAIRMAN MOORE: Bottom-line positions are not
16 what settlement --

17 MR. TOURTELLOTTE: I understand --

18 CHAIRMAN MOORE: -- discussions are made of.

19 MR. TOURTELLOTTE: But the real --

20 CHAIRMAN MOORE: Is there room for you and the
21 staff to reach a -- is there a likelihood that you and the
22 staff can reach an agreement, in your view?

23 MR. TOURTELLOTTE: Well, I was really stating
24 that as a preliminary. My view is, I am willing to settle
25 on that basis, but I can't really speak for the staff. I

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1 don't --

2 MS. MARCO: Right, staff is always willing --

3 CHAIRMAN MOORE: I'm not asking you to.

4 MS. MARCO: We're always --

5 CHAIRMAN MOORE: It's a simple question. Do you
6 think further settlement discussions with the staff would
7 be fruitful? Yes or no.

8 MR. TOURTELLOTTE: I have no way of knowing; I
9 really don't.

10 CHAIRMAN MOORE: Ms. Marco, do you think that
11 there is any likelihood that you and the licensee could
12 settle this matter?

13 MS. MARCO: There is room for settlement.

14 CHAIRMAN MOORE: There is room? Would it be
15 helpful if the Board struck a match and gave you two weeks
16 to propose, to see if you can reach a settlement, and come
17 back and send us a report on whether you were successful?
18 Or would that not be helpful? And the reason I say two
19 weeks is, Mr. Tourtellotte, you have represented to us
20 that your schedule through the 29th --

21 MR. TOURTELLOTTE: From the 8th to the, sort of
22 the 23rd --

23 CHAIRMAN MOORE: September is a difficult month
24 for you.

25 MR. TOURTELLOTTE: Yes, I'm gone to the West for
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1 a week beginning the 8th, and I go directly from there to
2 France for a week. And so that two weeks -- if we can
3 work on something between now and a week from Friday,
4 otherwise I won't be able to work on it again until I get
5 back in late September -- last week in September.

6 CHAIRMAN MOORE: Can the staff accommodate that
7 schedule for you two to try to work out a settlement
8 agreement? Or is that a schedule that would not be
9 convenient for the staff?

10 MS. MARCO: I'm -- one minute, Your Honor,
11 please. Yes.

12 CHAIRMAN MOORE: Then we will hold off issuing
13 any Order and the Board would urge the parties to get
14 together and see if you can't reach a settlement in this
15 matter. And report to us -- and I'm sorry, I do not have
16 a calendar, but would --

17 MS. MARCO: I have one.

18 CHAIRMAN MOORE: -- two weeks from -- this is
19 Wednesday -- two weeks from today?

20 MS. MARCO: Two weeks from today would be
21 September 10th.

22 CHAIRMAN MOORE: Report to us on the 10th as to
23 whether, 1) you have been able to reach agreement, 2) if
24 not, how far the distance is apart and any suggestions on
25 closing that distance --

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1 MS. MARCO: Okay.

2 CHAIRMAN MOORE: -- or, 3) whether settlement is
3 unlikely.

4 ADMINISTRATIVE JUDGE RUBENSTEIN: Or if you can
5 agree now on some sort of more limited contention.

6 CHAIRMAN MOORE: Judge Rubenstein, if I may be
7 so bold as to suggest, let's take that up after --

8 ADMINISTRATIVE JUDGE RUBENSTEIN: Okay.

9 CHAIRMAN MOORE: -- the close of this
10 conference. We will then respond to your filing with us
11 and either indicate whether we think further settlement --
12 the possibility of settlement exists, or we will issue a
13 pre-hearing conference Order setting forth our view and
14 hence, the controlling view of the issues in the
15 proceeding, and a schedule for resolving them.

16 Now, jumping ahead, assume -- and by doing this
17 I want to in no way, imply that the parties should not
18 fully pursue settlement, because as I have expressed and I
19 believe my colleagues are in full accord, this case we
20 think, can be settled and probably should be.

21 But assuming for the moment that it's not, our
22 tentative inclination would be that a dispositive Summary
23 Disposition Motion on the jurisdictional question is a
24 very strong likelihood. And I think we'll need to
25 ruminate on the question of whether the --

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1 ADMINISTRATIVE JUDGE RUBENSTEIN: The last word
2 I heard was Summary Disposition.

3 CHAIRMAN MOORE: I'm sorry, Judge Rubenstein,
4 I'm not speaking into the microphone. And we will then
5 let you know in that order, the other issues and whether
6 we want them to be approached with a dispositive Motion as
7 well.

8 But again, I would urge you over the next two
9 weeks, to try to settle this matter because frankly, from
10 what we've heard today, it's probably better for you all
11 to reach an agreement that you're happy with than to both
12 of you to be unhappy with something that we're going to
13 direct.

14 If there's nothing further then we will expect
15 from you two weeks from today, a report on whether you've
16 been able to settle and if not, whether there's a
17 likelihood of future settlement, and any other suggestions
18 in that regard you have for us. And then we will take and
19 issue a, if there is no settlement or likelihood of
20 further settlement discussions, we'll issue a pre-hearing
21 conference Order.

22 If there's nothing further, we'll stand
23 adjourned.

24 MS. MARCO: Thank you.

25 MR. TOURTELLOTTE: Thank you.
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1 (Whereupon, the Pre-Hearing Conference was
2 concluded at 3:07 p.m.)
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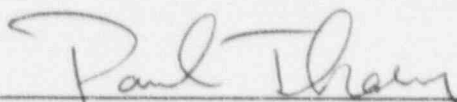
This is to certify that the attached
proceedings before the United States Nuclear
Regulatory Commission in the matter of:

Name of Proceeding: 21st Century Technologies, Inc.

Docket No.: 030-30266-CIVP
ASLPB No. 97-729-01-CIVP

Place of Proceeding: Rockville, MD

were held as herein appears, and that this is the original
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Paul Thorn
Official Reporter
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