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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
OF THE BOARD  
AND  
ASSOCIATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

21st CENTURY TECHNOLOGIES, INC.

(Fort Worth, Texas)

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Docket No. 030-30266 - CIV P

NRC STAFF MOTION FOR SUMMARY DISPOSITION OF ISSUE  
REGARDING APPROPRIATENESS OF SEVERITY LEVEL AND CIVIL PENALTY

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's (Board) September 24, 1997, Prehearing Conference Order and 10 C.F.R. § 2.749 of the Commission's regulations, the staff of the Nuclear Regulatory Commission (Staff) hereby moves the Board for summary disposition in its favor of the issue of whether the violations set forth by the Staff in the Appendix to the April 10, 1997, Order Imposing Civil Monetary Penalty were appropriately designated as Severity Level III violations under the Commission's Enforcement Policy and warrant a \$2,500 civil penalty. For the reasons set forth below, the Staff's motion should be granted.

BACKGROUND

On May 15, 1996, the Staff issued a "Notice of Violation and Proposed Imposition of Civil Penalty--\$7,500" (Notice of Violation) and a "Confirmatory Order Modifying License (Effective Immediately)" to 21st Century Technologies, Inc. (Licensee) that set forth two violations of NRC

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requirements and assessed a civil penalty in the amount of \$7,500.<sup>1</sup> The Licensee responded to the Notice of Violation in a Reply and an Answer, both dated October 1, 1996. Reply to Notice of Violation, dated October 1, 1996; Answer to Notice of Violation, dated October 1, 1996. On April 10, 1997, the Staff, taking into account the Licensee's responses to the Notice of Violation, issued its "Order Imposing a Civil Monetary Penalty" (Order) in the amount of \$2,500 to the Licensee. 62 Fed. Reg. 19,816 (1997). On April 25, 1997, the Licensee requested a hearing on the Order, and on June 23, 1997, a Board was established to preside in this proceeding. 62 Fed. Reg. 34,718 (1997).

On July 3, 1997, the Board issued a "Memorandum and Order (Initial Prehearing Order)" (Order), which, among other things, directed the parties to submit a joint prehearing report containing a statement outlining the central issues for litigation in the proceeding. Order at 6. The Board provided that "[i]f the parties cannot agree on the wording or inclusion of any issue, the statement should set forth that issue separately with a notation identifying the sponsoring party." Order at 6. On August 5, 1997, the parties submitted a "Joint Prehearing Report," setting forth their respective positions.

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<sup>1</sup> The violations were set forth as follows:

A. License No. 30-23697-01E authorizes the licensee to distribute SRB Technologies, Inc., Model PRH-800/G/200 sealed light sources.

Contrary to the above, from June to August 1995, the licensee distributed tritium sealed light sources from a manufacturer not authorized in the license.

B. License Condition 10 of License No. 30-23697-01E authorizes the licensee to distribute sealed light sources in specified gunsights and in specified configurations.

Contrary to the above, from July to September 1995, the licensee distributed tritium sealed light sources in configurations not specified or otherwise authorized in the license.

On August 27, 1997, the Board held a prehearing conference to address the proposed issues set forth in the Joint Prehearing Report. On September 24, 1997, the Board issued a Prehearing Conference Order in which the Board, among other things, directed the Staff to file a motion for summary disposition on the issue of whether the alleged violations appropriately charge Severity Level III violations under the Commission's Enforcement Policy and warrant a \$2500 civil penalty.<sup>2</sup> Prehearing Conference Order at 5. The Board noted that the Licensee admitted the facts leading the Staff to conclude that the violations occurred. *Id.* The Board directed that the Staff, in seeking summary disposition, fully comply with the provisions of 10 C.F.R. § 2.749. The Board ordered that the Staff file its motion for summary disposition by Friday, October 24, 1997.

### DISCUSSION

#### I. Legal Standards for Summary Disposition

It is well settled that an agency may ordinarily dispense with an evidentiary hearing where no genuine issue of material fact exists. *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987). Summary disposition is favored by the Commission as "an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 (1982), (citation omitted).

Any party may move for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. 10 C.F.R. § 2.749(a). Summary disposition is

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<sup>2</sup> The Board additionally directed the Staff to file a motion for summary disposition on an issue proposed by the Licensee pertaining to the agency's authority to impose and enforce certain conditions in a Part 30 license, the violation of which is the subject of the instant enforcement action. Prehearing Conference Order at 3. The Staff's motion for summary disposition regarding this issue is being filed today under separate cover.

appropriate if the filings in the proceeding, including depositions, statements of the parties, and affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. 10 C.F.R. § 2.749(d). In general, the Commission, when considering motions for summary disposition filed pursuant to 10 C.F.R. § 2.749, applies the same standards that the Federal courts use in determining motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). Rule 56 is analogous to section 2.749 of the Commission's regulations. *Id.*

The party seeking summary judgment has the burden of proving the absence of genuine issues of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Advanced Medical Systems, Inc.*, 38 NRC at 102. In addition, the record is viewed in the light most favorable to the party opposing the motion. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 144 (1991). However, if the moving party makes a proper showing for summary disposition and the opposing party fails to show that there is a genuine issue of material fact, the Board may summarily dispose of all or the matters before it on the basis of the filings in the proceeding, the statements of the parties, and affidavits.<sup>3</sup>

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<sup>3</sup> When the party moving for summary disposition has carried its burden, the party opposing the motion must set forth specific facts showing that there is a genuine issue of material fact. 10 C.F.R. § 2.749(b); *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 93 (1986). General denials and bare assertions are not sufficient to preclude summary disposition when the proponent has met its burden. *Advanced Medical Systems, Inc.*, 38 NRC at 102. Although the opposing party does not need to demonstrate that it will succeed on the issues, it must at least demonstrate that a genuine issue of fact exists to be tried. *Id.*; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 154 (1992) (to avoid summary disposition, opposing party had to present contrary evidence that was so significantly probative as to create a material issue of fact).

(continued...)



*Advanced Medical Systems, Inc.*, 38 NRC at 102; 10 C.F.R. § 2.749(d). In the instant proceeding, for the reasons set forth below, there exists no genuine issue of material fact with respect to the issue of the appropriateness of the Staff's assessment of the violations at Severity Level III under the Commission's Enforcement Policy and the appropriateness of the amount of the civil penalty imposed. Accordingly, the Staff is entitled to a decision in its favor on this issue as a matter of law.

II. There is no Genuine Issue With Respect to Whether, On the Basis of the Violations, the Order Should Be Sustained

The attached affidavit of Geoffrey D. Cant, Enforcement Specialist in the Office of Enforcement, explains how the Staff assigned the severity level to the two violations and assessed the amount of the civil monetary penalty for the violations. Affidavit of Geoffrey D. Cant in Support of NRC Staff's Motion for Summary Disposition, (Cant Affidavit), attached hereto as Exhibit 1. Mr. Cant's affidavit establishes that the Staff's determination of the severity level and amount of the civil penalty was made in accordance with the Commission's "General Statement of Policy and Procedures for NRC Enforcement Actions," NUREG-1600 (Enforcement Policy). The Enforcement Policy is attached hereto as Exhibit 2. Mr. Cant participated in the Enforcement Conference with the Licensee on April 23, 1996, and in the preparation of the May 15, 1996, Notice of Violation and

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<sup>3</sup>(...continued)

Section 2.749 of the Commission's regulations further requires that the moving party annex to its motion a statement of those facts with respect to which it contends there is no genuine issue to be heard. The opposing party must annex to its answer a statement of material facts as to which it contends there does exist a genuine issue to be heard. 10 C.F.R. § 2.749(a). If the opposing party fails to controvert the statement served by the moving party, all of the facts set forth in the statement of the moving party will be deemed admitted. *Id.*; *Advanced Medical Systems, Inc.*, 38 NRC at 102-03; *Rhodes-Sayre Associates, Inc.*, LBP-91-15, 33 NRC 268, 271 (1991). In addition, section 2.749 provides that when a movant for summary disposition has satisfied its burden and has supported its motion with affidavits, a party opposing the motion must proffer countering evidence or an affidavit explaining why it is impractical to do so. 10 C.F.R. § 2.749(b)-(c).

Proposed Imposition of Civil Penalty and Confirmatory Order. Cant Affidavit at ¶ 6. Further, Mr. Cant prepared the April 10, 1997, Order Imposing Civil Monetary Penalty.

A. Assignment of a Severity Level to the Violations

The first step in determining an enforcement sanction is assigning the severity level. Under the Enforcement Policy, Severity Level I violations are the most significant, and Severity Level IV violations are the least significant. Enforcement Policy § IV. The Enforcement Policy provides examples of violations at each severity level. Cant Affidavit at ¶¶ 11-12. These examples serve as guidance for the Staff in assessing a severity level for a violation and are neither exhaustive nor controlling. Enforcement Policy § IV.

The Staff assigned the violations in the instant matter a severity level based on an example provided in Supplement VI of the Enforcement Policy. Cant Affidavit at ¶¶ 12-14. Section IV of the Enforcement Policy provides that licensed activities are to be placed in the supplement most suitable in light of the particular violation involved. Cant Affidavit at ¶ 12. The Staff determined that the Licensee's activity area corresponded with Supplement VI, "Fuel Cycle and Materials Operation." *Id.*

The Staff compared the Licensee's violations to an example in Supplement VI. Cant Affidavit at ¶ 13. The seventh example, an example of a Severity Level III violation, was:

A breakdown in the control of licensed activities involving a number of violations that are related (or, if isolated, that are recurring violations) that collectively represent a potentially significant lack of attention or carelessness toward licensed responsibilities;

Supplement VI.C.7.

In making this determination, the Staff concluded that the Licensee demonstrated a

significant lack of management attention to licensed activities. Cant Affidavit at ¶ 14. The Staff's conclusion was based on the ample opportunities for the Licensee's managers to understand the license prior to the occurrence of the violations. Cant Affidavit at ¶ 14. These prior opportunities are described in a March 22, 1996, Report of Investigation prepared by the Office of Investigations (OI Report), which the Staff considered in developing the enforcement action taken. Cant Affidavit at ¶¶ 8-9. A redacted copy of the Report of Investigation, No. 4-95-022, March 22, 1996 (OI Report) is attached hereto as Exhibit 3. The Staff also considered exhibits to the OI report, such as correspondence between the Licensee and the Staff, transcribed interviews conducted by OI investigators of the Licensee's officials, and meeting notes prepared by Ms. Susan L. Greene of the NRC staff. Cant Affidavit at ¶¶ 15-18. In addition, Mr. Cant considered statements made by the Licensee's consultant at the April 23, 1996 Predecisional Enforcement Conference. Cant Affidavit at ¶ 15. This information demonstrates a significant lack of attention to or carelessness toward licensed activities, and, therefore, the Staff's categorization of the Licensee's violations at Severity Level III was appropriate. See Cant Affidavit at ¶¶ 14, 20; Enforcement Policy, § IV, (Severity Level III violations are "cause for significant regulatory concern"); Enforcement Policy, Supplement VI.C.7.

B. The March 22, 1996 OI Report

OI conducted an investigation between May 9, 1995 and March 22, 1996 to determine whether the Licensee, then known as Innovative Weaponry Inc. (IWI), was deliberately violating its NRC license conditions by distributing unauthorized luminous gunsights containing tritium and by distributing gunsights containing tritium obtained from an unauthorized source. The OI Report concluded that IWI deliberately violated its NRC license by selling certain night sights unmounted, a configuration not authorized by the license, and by selling night sights containing tritium from an unauthorized source. OI Report at 26, 34. The Staff, in preparing the enforcement action, evaluated several exhibits of the OI Report.<sup>4</sup>

The OI Report contains as an exhibit a letter to Susan L. Greene of the Medical, Academic, and Commercial Use Safety Branch, Division of Industrial and Medical Nuclear Safety, Office of Nuclear Material Safety and Safeguards, NRC, from Kenneth Wilson, the Licensee's consultant, dated November 28, 1994. This letter is attached hereto as Exhibit 4. In his letter, Mr. Wilson references a conversation he had with Ms. Greene and, based on that conversation, submitted proposed changes IWI would like made to the license. In particular, Mr. Wilson stated that IWI wanted to "[c]hange the license to an all encompassing license, regardless of exterior shape or design provided certain minimum tolerances are maintained." Further, Mr. Wilson stated that the Licensee "[w]ould like to include other manufacturers (*sic*) sights provided minimum tolerances are maintained." Letter of November 28, 1994. This letter demonstrates that Mr. Wilson, the Licensee's

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<sup>4</sup> It should be noted that although the Staff did not cite the Licensee for deliberate violations, it considered the information contained in the OI Report and exhibits to arrive at the conclusion that the Licensee's new management demonstrated a significant lack of management attention to licensed activities, such that a Severity Level III designation was appropriate. Cant Affidavit at ¶ 8.



consultant, had ample opportunity to understand, and, in fact, did discuss the terms and conditions of the NRC license with the NRC, and knew what was in the license.<sup>5</sup>

The OI Report lists as an exhibit a letter to Kenneth Wilson from Margaret V. Federline, Chief, Medical, Academic, and Commercial Use Safety Branch, Division of Industrial and Medical Nuclear Safety, Office of Nuclear Material Safety and Safeguards, NRC, dated January 23, 1995. This letter is attached hereto as Exhibit 7. Ms. Federline's letter requested information regarding the Licensee's request to transfer ownership of IWI and to change its NRC license. With respect to the Licensee's request to change its license terms, Ms. Federline requested that the Licensee submit a complete application concerning its distribution activities and products. To this end, she requested that the Licensee "review the distribution program and previous applications, and submit a complete application concerning the current distribution activities." January 23, 1995 letter at 3. The letter addressed Mr. Wilson's request to have authorization to include other manufacturers' sights. The letter concluded by requesting that the application be resubmitted and signed by an officer of the Licensee. This letter demonstrates that the Licensee had another opportunity to review its activities and understand the terms of the license.

The OI Report contains as an exhibit a letter to Ms. Federline from David Gregor, President of IWI, dated February 20, 1995. A copy of this letter without attachments is attached hereto as Exhibit 8. In his letter, Mr. Gregor stated that the Licensee "is fully aware of the commitment to the

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<sup>5</sup> Mr. Wilson identified himself as a financial consultant to the Licensee under oath during a transcribed interview on October 19, 1995. Office of Investigations Interview of Kenneth E. Wilson at 4. Relevant pages of this transcript, which is listed as an exhibit of the OI Report, are attached hereto as Exhibit 5. In addition, Mr. Wilson was involved in the licensing process and in representing the Licensee to the NRC. See Report of Interview with Kenneth E. Wilson, attached hereto as Exhibit 6.

responsibilities of the Company and accepts this responsibility." February 20, 1995 Letter at 2. Mr. Gregor specified the tritium configurations he wanted to be listed on the license and the model sight configuration. This letter demonstrates that the Licensee's president had an opportunity to understand, and, in fact, did understand, the terms of the Licensee's license prior to the occurrence of the violations.

The OI Report contains as an exhibit a Note to File, prepared by Ms. Greene, regarding a February 22, 1995, meeting with Mr. Wilson and two attorneys from the Office of the General Counsel, including the undersigned counsel. Ms. Greene's Note to File is attached hereto as Exhibit 9, and her affidavit supporting its authenticity is attached hereto as Exhibit 10. During the meeting, Ms. Greene discussed the terms and conditions of the current distribution license, including a detailed description of what exactly the license covered. As the note indicates, it was stressed to Mr. Wilson that the license is very specific, and, therefore, limiting. This note to file demonstrates that the Licensee had an opportunity to meet with the NRC to discuss the terms and conditions of the license.

The OI Report contains as an exhibit a letter to Ms. Patricia Wilson, Executive Vice President, IWI, from Susan L. Greene, dated April 3, 1995. A copy of this letter without attachments is attached hereto as Exhibit 11. This letter transmitted Amendment No. 4, which amended the license for the purpose of transferring the license from IWI of New Mexico to IWI of Nevada.<sup>6</sup> The letter stated: "Please review the enclosed document carefully and be sure that you understand all the conditions. If there are any errors or questions, please contact me so that

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<sup>6</sup> A copy of Amendment 4 to the license was forwarded to the Board by letter dated August 28, 1997. Letter from Ann P. Hodgdon, Counsel for NRC Staff, to Administrative Judges.

appropriate corrections and answers can be provided." In addition, the letter stated: "Distribute only those products containing radioactive material in the configurations specifically authorized in License Condition No. 10," and "Notify the NRC and obtain an amendment, if appropriate, if you plan to . . . make any other changes in your program which are contrary to the license conditions . . ." This letter demonstrates yet another opportunity for the Licensee to become familiar with the terms of its license, as well as an admonition regarding adherence to its terms. This letter is of particular significance because it transmits a copy of the license itself and invites the Licensee to ask any questions concerning the license terms.

The OI Report also contains as an exhibit a transcribed interview of David M. Gregor, the Licensee's president, taken under oath, on October 19, 1995. Relevant pages of the transcript are attached hereto as Exhibit 12. Mr. Gregor stated during the interview that he became president of IWI in November, 1994. Tr. at 4. Mr. Gregor did not recall reading the NRC license prior to June of 1995. Tr. at 13. Mr. Gregor stated that the license referenced previous communications [letters], but he had no way of knowing anything about the communications. Tr. 137. When asked, "Have you asked the NRC to provide copies of those communications?" Mr. Gregor stated that had not personally and, to his knowledge, no one at IWI had, either. Tr. 138. This transcript demonstrates that Mr. Gregor, the Licensee's president, did not familiarize himself with the license's terms and conditions until long after becoming the Licensee's president in November of 1994. These facts show a significant lack of attention or carelessness toward licensed responsibilities on the part of the Licensee's president.

C. The April 23, 1996 Enforcement Conference

Mr. Cant participated in the Enforcement Conference held on April 23, 1996. Cant Affidavit

at ¶ 6. Relevant pages of the transcript of the Enforcement Conference are attached hereto as Exhibit 13. During the Enforcement Conference, Mr. Cant asked Mr. Wilson about his discussion with the NRC during the February 22, 1995, meeting. Cant Affidavit at ¶ 15. Specifically, Mr. Cant asked:

Didn't the NRC staff explain to you that it [the amended license] would authorize distribution of certain kinds of sights of certain configurations and emphasize that there were considerable limitations on just what was authorized? (Tr. 96)

Mr. Wilson replied that "there were considerable limitations at the time, yes." Enforcement Conference, Tr. 96. Mr. Wilson also stated that, following the meeting with the NRC, he informed Mr. Gregor, the Licensee's president, and Ms. Wilson, the Vice President, that there were limitations in the license. Tr. 96-97.

D. The Severity Level

The Staff considered that the events set forth above occurred and the correspondence discussed above was exchanged in the period prior to the violations, which occurred from June to August, 1995. Cant Affidavit at ¶ 20. The Staff determined that the facts collectively represent a significant lack of attention to, or carelessness toward, licensed activities. *Id.* The violations reflected a continuing failure of management to ensure that the Licensee conducted its activities in compliance with the terms of its license. Cant Affidavit at ¶ 20.

The Staff also considered the regulatory significance of the violations as discussed in the affidavit of Mr. Larry W. Camper, Branch Chief for the Medical, Academic, & Commercial Use Safety Branch, Division of Industrial & Medical Nuclear Safety, Office of Nuclear Material Safety and Safeguards. Mr. Camper's affidavit is attached hereto as Exhibit 14. Mr. Camper, in his affidavit, states that the approval for a specific license to manufacture, produce, or initially transfer



or distribute self-luminous products containing radium to persons exempt from the requirements for a license requires that sufficient information be submitted for review and approval to satisfy the design and safety criteria in 10 C.F.R. §§ 32.22, 32.23, and 32.24. Camper Affidavit at ¶ 3. This review and approval process is the cornerstone of the exempt distribution process and is the mechanism whereby the NRC assures that the products distributed to exempt persons do not pose a threat to public health and safety. Camper Affidavit at ¶ 3.

If sufficient information about the product is not submitted or if the NRC is not provided the opportunity to conduct the required review of the product to ensure that all exposures to the public are as low as reasonably achievable such that persons will not receive unnecessary exposure to radiation, then there is no reasonable assurance that a public health and safety threat does not exist. Camper Affidavit at ¶ 4. Mr. Camper states in his affidavit that, in this case, the lack of management oversight, which resulted in the distribution of products unreviewed by the NRC, deprived the NRC of the ability to evaluate whether exposure to the public from distribution of sources and distribution in specific configurations would be as low as reasonably achievable and that the public would not receive unnecessary exposure and that other aspects of the safety criteria in 10 C.F.R. § 32.23 had been satisfied. Camper Affidavit at ¶ 6. Therefore, the failures by management make the matter one of significant regulatory concern, and, thus, the violations were appropriately assigned Severity Level III. *Id.*

#### E. Calculation of the Base Civil Penalty

After assigning the Severity Level to the violations, the Staff derived the civil penalty amount using Tables 1A and 1B of the Enforcement Policy. Cant Affidavit at ¶ 21; Enforcement Policy VI.B.1. Table 1A shows the base civil penalty at Severity Level I for different classes of



licensees. Enforcement Policy VI.B, Table 1A. A distributor of byproduct material in gunsights is classified under "other" in Table 1A. Cant Affidavit at ¶ 21. The base civil penalty for this group of licensees is \$5,000 for Severity Level I. *Id.* For a Severity Level III violation for this class of licensee, Table 1B specifies that 50% of the Severity Level I amount is used, resulting in a base penalty of \$2,500.

F. Application of the Adjustment Factors to the Base Civil Penalty

The Enforcement Policy states in Section VI.B.2 that "[i]n an effort to (1) emphasize the importance of adherence to requirements and (2) reinforce prompt self-identification of problems and root causes and prompt and comprehensive correction of violations, the NRC reviews each proposed civil penalty on its own merits and, after considering all relevant circumstances, may adjust the base civil penalties shown in Table 1A and 1B for Severity Level I, II, and III violations . . . ." Enforcement Policy, Section VI.B.2. Adjustments are considered for identification and corrective action. *Id.*; Cant Affidavit at ¶ 23. Credit was not given to the Licensee for identification as the NRC identified the violations during its May 1995-March 1996 investigation. Cant Affidavit at ¶ 23. Nor was credit given for corrective action, as the Licensee had not demonstrated prompt and comprehensive corrective action. *Id.* The Staff may also exercise discretion to escalate or mitigate the sanction. Enforcement Policy, Section VII. The Staff exercised its enforcement discretion to raise the civil penalty to \$7,500 to reflect management's failure to assure that the requirements were met. Cant Affidavit at ¶ 26.

The Enforcement Policy provides:

Notwithstanding the normal guidance contained in this policy, as provided in Section III, "Responsibilities," the NRC may choose to exercise discretion and either escalate or mitigate enforcement sanctions within the Commission's statutory

authority to ensure that the resulting enforcement action appropriately reflects the level of NRC concern regarding the violation at issue and conveys the appropriate message to the licensee.

Enforcement Policy, Section VII. An example of a situation in which this discretion should be considered is one "involving particularly poor licensee performance." Cant Affidavit at ¶ 24. The Staff considered that the Licensee's performance was "significantly poor;" indeed, it was of significant regulatory concern. Cant Affidavit at ¶ 30. Therefore, the Staff proposed the issuance of a civil penalty in the amount of \$7,500 in its May 15, 1996, Notice of Violation and Proposed Imposition of Civil Penalty.

G. The Licensee's Answer and Response to the Notice of Violation and Proposed Imposition of Civil Penalty

On October 1, 1996, the Licensee responded to the Staff's May 15, 1996, Notice of Violation and Proposed Imposition of Civil Penalty.<sup>7</sup> In its response, the Licensee admitted committing the violations, but denied that the violations were of requirements established through a lawful exercise of regulatory authority under the Atomic Energy Act (AEA), disagreed with the assessment of the severity level, stated that the size of the civil penalty would impose financial hardship on the Licensee, argued that the NRC's standards for imposing penalties were too vague to meet due process standards, and complained that it did not have basic information upon which the decision to impose the civil penalty was based. The Staff considered the Licensee's arguments and concluded that the violations occurred as stated. However, after further consideration of the safety significance of the violations, the Staff reduced the civil penalty by \$5,000. Cant Affidavit at ¶ 30. The Staff

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<sup>7</sup> The Licensee was granted several extensions of time in which to respond. See e.g., Letter from James Lieberman, Director, Office of Enforcement to James Tourtellotte, Esq., dated June 3, 1996 (granting extension of time to July 15, 1996); Letter from James Tourtellotte to James Lieberman, dated September 3, 1996 (confirming extension of time until October 1, 1996).

concluded that a civil monetary penalty of \$2,500 was appropriate. *Id.*

Mr. Cant's affidavit provides a sound basis for upholding the civil monetary penalty imposed by the Staff's April 10, 1997, Order. The affidavit establishes that the severity level assessed for the violations and the amount of the civil penalty determined were determined in accordance with the Enforcement Policy. The affidavit shows that there exists no genuine issue with respect to whether, on the basis of the violations, the Order imposing a civil monetary penalty in the amount of \$2,500 should be sustained.

#### CONCLUSION

For the reasons set forth above, and based on the affidavit and other exhibits attached to this motion, as well as the Staff's motion for summary disposition of the jurisdictional issue also filed this day, the Board should find that the April 10, 1997, Order imposing a civil monetary penalty in the amount of \$2,500 should be sustained. Accordingly, the Staff requests that the Board grant the Staff's motion for summary disposition and sustain the April 10, 1997 Order.

Respectfully submitted,

*Catherine L. Marco*

Catherine L. Marco  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 24th day of October, 1997

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
21st CENTURY TECHNOLOGIES, INC. ) Docket No. 030-30266  
 )  
(Fort Worth, Texas) )

STATEMENT OF MATERIAL FACTS  
ABOUT WHICH NO GENUINE ISSUE EXISTS

1. 21st Century Technologies, Inc. (formerly Innovative Weaponry, Inc.) (Licensee) is the holder of License No. 30-23697-01E issued by the U.S. Nuclear Regulatory Commission.
2. The Licensee demonstrated a significant lack of management attention to licensed activities.
3. The Licensee's managers had ample opportunities to understand the license prior to the occurrence of the violations.
4. A November 28, 1994, letter to Susan L. Greene, NRC, from Kenneth Wilson proposes changes that IWI wished to have made to the license.
5. In the November 28, 1994, letter, Mr. Wilson stated that IWI wanted to "[c]hange the license to an all encompassing license, regardless of exterior shape or design provided certain tolerances are maintained."
6. In the November 28, 1994, letter, Mr. Wilson stated that the Licensee "[w]ould like to include other manufacturers (sic) sights provided minimum tolerances are maintained."
7. The November 28, 1994 letter demonstrates that Mr. Wilson, the Licensee's consultant had ample opportunity to understand, and discuss the terms and conditions of the NRC license with the NRC.
8. The November 28, 1994 letter demonstrates that Mr. Wilson, the Licensee's consultant, knew what was in the license.
9. A January 23, 1995 letter to Kenneth Wilson from Margaret V. Federline, NRC, requested that the Licensee "review the distribution program and previous applications, and submit a complete application concerning the current distribution activities."

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10. The January 23, 1995 letter demonstrated that the Licensee had an opportunity to understand the terms of its license.
11. In a letter dated February 20, 1995, from David Gregor, the Licensee's president, to Margaret V. Federline, NRC, Mr. Gregor stated that the Licensee is "fully aware of the commitment to the responsibilities of the Company and accepts this responsibility."
12. In the February 20, 1995 letter, Mr. Gregor specified the tritium configurations he wanted to be listed in the license and the model sight configuration.
13. The February 20, 1995 letter demonstrates that the Licensee's president had an opportunity to understand, and did understand, the terms of the license prior to the occurrence of the violations.
14. Ms. Susan Greene of the Office of Nuclear Material Safety and Safeguards, NRC, met with Mr. Wilson on February 22, 1995.
15. During the February 22, 1995 meeting, Ms. Greene discussed the terms and conditions of the license, including a detailed description of what exactly the license covered.
16. During the February 22, 1995 meeting, Ms. Greene stressed to Mr. Wilson that the license was very specific, and, therefore, limiting.
17. Ms. Greene documented this meeting in a note to file, which contains a description of the matters discussed at the meeting.
18. During an Enforcement Conference on April 23, 1996, Mr. Cant of the Office of Enforcement, NRC, asked Mr. Wilson about his discussions with the NRC at the February 22, 1995 meeting.
19. At the April 23, 1996, Enforcement Conference, Mr. Cant asked Mr. Wilson whether the NRC staff emphasized that there were considerable limitations on what the license authorized, to which Mr. Wilson replied that "there were considerable limitations at the time, yes."
20. At the April 23, 1996 Enforcement Conference, Mr. Wilson stated that following the meeting of February 22, 1995, he informed Mr. Gregor, the Licensee's president, and Ms. Patricia Wilson, the vice president, that there were limitations in the license.
21. An April 3, 1995 letter to Ms. Patricia Wilson, Executive Vice President, from Susan Greene, NMSS, transmitted an amendment of the license which transferred the license from IWI of New Mexico to IWI of Nevada.



22. The April 3, 1995 letter stated: "Please review the enclosed document carefully and be sure that you understand all the conditions. If there are any errors or questions, please contact me so that appropriate corrections and answers can be provided."
23. The April 3, 1995 letter stated: "Distribute only those products containing radioactive material in the configurations specifically authorized in License Condition No. 1C" and "Notify the NRC and obtain an amendment, if appropriate, if you plan to . . . make any other changes in your program which are contrary to the license conditions . . . ."
24. The April 3, 1995 letter demonstrates an opportunity for the Licensee to become familiar with the terms of its license.
25. In an October 19, 1995 interview, taken under oath, Mr. Gregor, the Licensee's president, did not recall reading the license prior to June of 1995. Mr. Gregor admitted that he did not request the letters referenced in the license and, to his knowledge, no one at IWI did, either.
26. The October 19, 1995 interview of Mr. Gregor demonstrates that Mr. Gregor did not familiarize himself with the license's terms and conditions until long after becoming the licensee's president.
27. The October 19, 1995 interview of Mr. Gregor demonstrates a significant lack of attention or carelessness toward licensed responsibilities on the part of the Licensee's president.
28. The Staff's classification of the two violations as Severity Level III in the Notice and in the Appendix to the Order is in accordance with the Commission's "General Statement of Policy and Procedure for NRC Enforcement Actions," set out in NUREG-1600 (Policy Statement).
29. The Staff's calculation of the amount of the base civil penalty of \$2,500 is in accordance with the Commission's Policy Statement.
30. The Staff's application of discretion to escalate the base civil penalty by \$5,000 is in accordance with the Commission's Policy Statement.

31. The final amount of the civil penalty assessed, \$2,500, after taking into account safety significance, was warranted.

Respectfully submitted,

*Catherine L. Marco*

Catherine L. Marco  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 24th day of October, 1997