

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Jerry R. Kline
Lester S. Rubenstein

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USNRC

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OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

SERVED SEP 24 1997

In the Matter of
21ST CENTURY TECHNOLOGIES, INC.
(License No. 30-23697-01E)

Docket No. 030-30266-CivP

ASLBP No. 97-729-01-CivP

September 24, 1997

PREHEARING CONFERENCE ORDER

At the prehearing conference in this civil penalty proceeding, 21st Century Technologies, Inc. ("Technologies") and the NRC Staff generally indicated that further settlement discussions might be useful. It now appears from the parties' joint report on those settlement negotiations that the likelihood of a settlement has dimmed considerably. Accordingly, this order establishes a schedule for the resolution of the issues in the proceeding. Nevertheless, we encourage the parties to continue their efforts to settle this matter.

1. In their joint prehearing report, the parties were unable to agree on a common statement of the issues in the proceeding. Technologies lists seven issues: five issues variously relating to an asserted lack of NRC jurisdiction over Technologies' actions and two issues concerning the

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severity level of the alleged violations and the assessed penalty. The Staff, on the other hand, lists two issues concerning whether the facts alleged in the violation notice occurred and the appropriateness of the severity level of the asserted violations.

Contrary to Technologies' assertions in the prehearing report that there are five separate issues concerning the agency's lack of authority to regulate Technologies' activities, there is only one jurisdictional issue involved. That jurisdictional issue, stated neutrally, is whether the Atomic Energy Act of 1954, as amended, grants the NRC the authority to impose and enforce conditions in a 10 C.F.R. Part 30 license concerning the tritium source supplier and model of sealed light sources, the manufacturer and model of the weapons on which the gunsights will be mounted, and the sealed source configuration of the tritium luminous gunsights, authorized to be possessed and distributed under the byproduct license. Further, the material facts relating to this jurisdictional issue do not appear to be in dispute. As Technologies conceded at the prehearing conference, the facts that led the Staff to conclude that violations of NRC requirements had occurred are admitted by Technologies.

Thus, the jurisdictional issue raised by Technologies is essentially a legal question that should be amenable to resolution by a dispositive motion. Although it appears that this issue could be resolved by a motion to dismiss for

lack of jurisdiction by Technologies, we think it is more appropriate under the circumstances for the Staff to file a motion for summary disposition on the jurisdictional issue that we have set forth. The Staff's motion for summary disposition on the jurisdictional issue shall be filed by Friday, October 24, 1997.

At the prehearing conference, the Staff argued that Technologies may not raise the issue of the agency's jurisdiction over Technologies' activities in this civil penalty proceeding. The Staff is free, of course, to pursue this argument if upon further reflection it still deems it appropriate.¹ If the Staff pursues this argument, however, it also should brief fully in its motion the alternate and

¹In support of its position that Technologies cannot challenge the agency's jurisdiction in this civil penalty proceeding, the Staff at the prehearing conference relied upon American Nuclear Corporation (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704 (1986). At first blush, that decision appears readily distinguishable from the instant proceeding. There the same three legal issues the licensees sought to raise in their hearing request in a proceeding begun by specific orders to impose new license conditions had been addressed and decided by the Commission in the agency's subsequently promulgated mill tailings regulations. The licensees' hearing requests thus were deemed to be an impermissible attack on the Commission's regulations.

If the Staff seeks to pursue this argument in this civil penalty proceeding, it should explain fully why CLI-86-23 is applicable precedent here and not distinguishable from the instant proceeding. Further, it should detail all other agency decisional authority that supports the Staff's asserted position that the issue of the agency's jurisdiction over Technologies' activities can only be raised as comments in a rulemaking proceeding or in a petition for a rulemaking -- the position the Staff took at the prehearing conference.

additional position that the NRC has jurisdiction over Technologies' activities that the Staff asserted in the Appendix to the April 10, 1997, Order Imposing Civil Monetary Penalty.

The Staff's summary disposition motion on the jurisdictional issue shall comply fully with the provisions of 10 C.F.R. § 2.749. Within the time specified in section 2.749(a), Technologies shall file an answer opposing the Staff's summary disposition motion on the jurisdictional issue that fully complies with all the provisions of section 2.749. If it asserts in a statement pursuant to section 2.749(a) accompanying its answer that there are disputed material facts in dispute, Technologies shall explain fully why each of those asserted disputed facts is material to the jurisdictional issue. Further, if it asserts, in accordance with section 2.749(c), that it cannot present by affidavit any facts essential to justify its opposition, Technologies shall detail fully and specifically what discovery is necessary to oppose the Staff's motion on the jurisdictional issue.

2. In the joint prehearing report, Technologies also lists as issues two questions concerning the appropriateness of the severity level of the alleged violations and the assessed penalty. For its part, the Staff agrees with Technologies that these two issues may be raised in this proceeding. Although stated as two separate questions by

Technologies, we believe these matters may be stated as a single issue: Whether the alleged violations appropriately charge severity level III violations under the Commission's enforcement policy and warrant a \$2500 civil penalty.

Because Technologies has admitted the facts leading the Staff to conclude that violations of NRC requirements occurred, this issue may also be amenable to summary disposition. Should the Staff decide to seek summary disposition of this issue, its summary disposition motion on this issue shall comply fully with the provisions of 10 C.F.R. § 2.749 and also shall be filed by Friday, October 24, 1997. In the event that it decides that summary disposition of this issue is not appropriate, the Staff should notify Technologies and the Licensing Board no later than October 8, 1997, of its decision not to seek summary disposition of this issue. Should the Staff decide not to pursue summary disposition of this issue, discovery on this issue will commence immediately upon its filing declining to seek summary disposition. The parties thereafter shall have 30 days to complete all discovery on this issue.

Technologies' answer opposing any Staff summary disposition motion on this issue shall comply fully with all the provisions of 10 C.F.R. § 2.749 and the guidance highlighted in part 1 of this order. Further, its answer shall be filed within the time specified in section 2.749(a).

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Handwritten signature of Thomas S. Moore in cursive script.

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

September 24, 1997

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NUCLEAR REGULATORY COMMISSION

In the Matter of

21ST CENTURY TECHNOLOGIES, INC.

(Order Imposing Civil Monetary
Penalty)

Docket No.(s) 30-30266-CIVP

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB PREHEARING CONFERENCE ORDER have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
24 day of September 1997

Adria T. Byrdson
Office of the Secretary of the Commission