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DOCKET NUMBER

BYPRODUCTS 30-30266-CIVP

SECRETARY

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 19, 1997

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OFFICE OF SECRETARY
DOCKETING & SERVICE
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MEMORANDUM TO: B. Paul Cotter, Jr.
Chief Administrative Judge
Atomic Safety and Licensing Board Panel

FROM: *John C. Hoyle*
John C. Hoyle, Secretary

SUBJECT: REQUEST FOR HEARING SUBMITTED BY
21ST CENTURY TECHNOLOGIES, INC.
(Re: EA-96-135)

Attached is a request for hearing filed with the Commission on April 25, 1997, by 21st Century Technologies, Inc. 21st Century Technologies, Inc. is the successor licensee to Innovative Weaponry, Inc. (Docket No. 30-30266). The hearing request was filed in response to an "Order Imposing Civil Monetary Penalty", issued by the NRC Staff on April 10, 1997. The Order was published in the Federal Register at 62 Fed. Reg. 19816 (April 23, 1997). (Copy Attached)

The request for hearing and related documents are being referred to you for appropriate action in accordance with 10 C.F.R. Sec. 2.772(j).

Attachments: as stated

cc: Commission Legal Assistants
OGC
CAA
OPA
EDO
NMSS
OE
James R. Tourtellotte, Esquire
Counsel for 21st Century Technologies, Inc.

9707030063 970619
PDR ADOCK 03030266
C PDR

DS02

JAMES R. TOURTELLOTTE
ATTORNEY AT LAW

SUITE 1141
1100 N. NASH STREET
ARLINGTON, VA 22209

TELEPHONE: (703) 522-3456
FACSIMILE: (703) 522-3567

Bar Admissions:

DISTRICT OF COLUMBIA
OKLAHOMA
U.S. SUPREME COURT

April 25, 1997

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

Re: EA 96-135 -- Request for an Enforcement Hearing

Dear Mr. Lieberman:

Attached is the "Request for an Enforcement Hearing" as permitted by your April 10, 1997 Order Imposing Civil Monetary Penalty at page 3. As the Order directs, copies are simultaneously being sent to:

- NRC's Document Control Desk
- Assistant General Counsel for Hearings and Enforcement
- Regional Administrator, NRC Region IV

Sincerely,



James R. Tourtellotte
Attorney for 21st Century Technologies

OGC-97- 001739

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UNITED STATES
NUCLEAR REGULATORY COMMISSION

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In the Matter of
21st CENTURY TECHNOLOGIES, INC.
Successor Licensee to
INNOVATIVE WEAPONRY, INC.
Fort Worth, Texas

EA 96-135

OFFICE OF SECRETARY
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REQUEST FOR AN ENFORCEMENT HEARING

On April 10, 1997, the NRC Director, Office of Enforcement issued an Order Imposing Civil Monetary Penalty in the referenced matter. The rationale for the Order is attached as an Appendix, Evaluation and Conclusion. The Order explains Licensee's right to a hearing at page 3 and the purpose of this filing is to exercise that right. An enforcement hearing is requested by Licensee.

The facts of the case and the positions of parties are set out in the Order Imposing Civil Monetary Penalty and the record heading up to that Order. The issues appear to be joined for the purpose of convening a hearing.

Briefly stated, Licensee contends:

The pattern of the NRC actions underlying this Order and the Order itself are beyond the agency's jurisdiction.

This contention poses the following issue of law:

Whether the NRC has jurisdiction to take regulatory actions in matters which have no health and safety or common defense and security consequences?

At least one factual issue is:

Whether the pattern of regulatory actions leading up to the Confirmatory Order and the action of issuing the Order itself were within the framework of powers and authority granted by statute?

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In turn, this issue raises a number of related factual matters such as:

What were the actions taken by the staff?

How do those activities relate to the powers and authority granted by statute?

(i) **A brief explanation of the basis for the contention.**

It is black letter law that the powers and authority of administrative officers and agencies are wholly derived from, defined and limited by the constitution, statute or other legislative or organic enactment. The point of Contention 1 is that the exercise of power and authority in this case goes beyond what enabling acts permit.

Specifically, licensee contends that the key limiting factors to the NRC's jurisdiction are that the exercise of powers and authority must be for the purpose of public health and safety or the common defense and security. Any attempt to impose regulatory requirements which have no health and safety consequences or adversely affect common defense and security are beyond the NRC's statutory authority.

The issue of common defense and security has no bearing on this matter because the amounts and intended uses of tritium are not significant to common defense and security uses. The NRC staff has never taken a contrary position and has made no mention of common defense and security as being an issue.

There are at least two points to be made about public health and safety matters. First, the NRC staff represented to the licensee that the case did not involve public health and safety but was solely a matter of license compliance. (See also NRC press release of May 16, 1996, where the Director of Enforcement is quoted as saying licensee's actions "did not result in any actual safety impacts.") Licensee's position is that if public health and

safety are not affected, the NRC staff has no jurisdiction to require compliance and any license condition which has no health and safety consequence is beyond the NRC's statutory power and authority to impose.

Point two is, the two alleged violations set out in the order have no reasonable relationship to public health and safety and are, therefore, unenforceable license conditions. The NRC staff's concession that there were no actual safety impacts tends to support this position. Just as important, however, is the nature of the license conditions themselves.

Violation 1 states:

IWI distributed tritium in gunsights not approved by the NRC and not specifically authorized in the license.

The underlying NRC staff licensing activities include review of the configuration and manufactured brand of gunsight into which tritium is inserted. This sometimes involves staff suggestions to move the position of the tritium insert right, left, up or down by only a thousandth of an inch, even though such positioning has no effect on public health or safety. Licensee maintains that sight configuration and manufactured brand are irrelevant to health and safety and therefore beyond the jurisdiction of the NRC to regulate. Regulatory prescription beyond that which is necessary to assure health and safety is unlawful.

Violation 2 states:

IWI distributed tritium sources from a manufacturer not authorized on the license.

Licensee maintains that designation of the tritium manufacturer is also irrelevant to public health and safety and is, therefore, beyond the jurisdiction of the NRC to regulate. The NRC may lawfully regulate performance standards to assure manufactured products meet

minimum standards of health and safety. But who manufacturers those products and who licensee chooses to buy from is a market issue beyond the scope of NRC jurisdiction and is irrelevant to the protection of public health and safety.

In the Appendix to the Order Imposing Civil Monetary Penalty, the Director, Office of Enforcement addresses the jurisdiction issue stating:

The thrust of the Licensee's disagreement goes to the agency's jurisdiction and the licensing system promulgated under 10 C.F.R. Part 30. Section 81 of the Atomic Energy Act (AEA or ACT) provides in part that a person may not transfer or receive, own, or possess any byproduct material except as authorized pursuant to the AEA.

The NRC's jurisdiction under Section 81 of the Act to regulate use of sealed sources containing byproduct material is long-established. Regulations controlling radioactive materials are promulgated under the Act to protect health and minimize danger to life by endeavoring to ensure that licensees will do what is required to prevent adverse impacts on public health and safety.

The Director's citation of Section 81 of the Atomic Energy Act only begs the question of proper exercise of jurisdiction. The prohibition that "a person may not transfer or receive, own, or possess any byproduct material except as authorized pursuant to the AEA" is not absolute. The NRC does not actually regulate all transfer, receipt, ownership or possession of any byproduct material. For example, although the NRC may play a role in the manufacture of smoke detectors having byproduct materials, NRC does not regulate retailers, installers or users of smoke detectors even though each clearly receives, owns, possesses and transfers these materials at some point in time.

It is clear, then, that Section 81 is only germane when considered in the context of some overreaching standard in the Act. Licensee's position is that the overreaching standard delineating the application of Section 81 is that in matters such as the one at hand, all of the

actions taken by the agency regarding technology must be necessary to protect the public health and safety. Indeed, the last sentence of the above-referenced quote from the NRC Director of Enforcement tends to support Licensee's position that agency actions which are not reasonably related to protection of public health and safety are beyond the jurisdictional authority of the NRC and are, therefore, null and void.

In any event, it appears that a clear dispute exists, that it is justiciable and that a hearing should be granted.

- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

The concise statement of the facts is set out under paragraph (i), a brief explanation of the basis for the contention. Licensee will rely chiefly upon the record of the case to date, testimony by staff and licensee witnesses, case law, statutes, regulations, agency policy and discovery information to support the contention or future contentions. Licensee intends to rely primarily on the facts to support its case, but may call expert witnesses if circumstances require.

- (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists on a material issue of law or fact.

The genuine dispute of law and fact is evidenced by the foregoing discussion, by the Appendix to the Order Imposing Civil Monetary Penalty and by the record of the

proceedings upon which the Order is based.

Licensee requests a hearing on the enforcement action taken in this case.



James R. Tourtellotte
Attorney for 21st Century Technologies

Proof of Service

Service is made in accordance with 10 C.F.R. § 2.701 by deposit in the U.S. Mail on

April 25, 1997



James R. Tourtellotte
Attorney for 21st Century Technologies

UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of
21st CENTURY TECHNOLOGIES, INC.
Successor Licensee to
INNOVATIVE WEAPONRY, INC.
Fort Worth, Texas

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EA 96-135

Certificate of Service

I hereby certify that copies of the foregoing Request for an Enforcement Hearing 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 C.F.R. § 2.701.

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

Regional Administrator
Region IV
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 400
Arlington, Texas 76011

NRC Document Control Desk
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Assistant General Counsel
for Hearings and Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dated at Arlington, Virginia, this
25th day of April, 1997


James R. Tourtellotte
Attorney for 21st Century Technologies



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20545-0001

EA 96-135

April 10, 1997

21st Century Technologies, Inc.
ATTN: Patricia Wilson
President
2513 East Loop 820 North
Fort Worth, Texas 76118

SUBJECT: ORDER IMPOSING CIVIL MONETARY PENALTY - \$2,500

Dear Ms. Wilson:

This is addressed to you as successor licensee to Innovative Weaponry, Inc., and refers to the Answer to Notice of Violation and Reply to Notice of Violation filed October 1, 1996 by your attorney, in response to the Notice of Violation and Proposed Imposition of Civil Penalty (Notice) sent to Innovative Weaponry, Inc. (IWI) by our letter dated May 15, 1996. Our letter and Notice described two violations identified during an NRC investigation conducted between May 9, 1995 and March 22, 1996. This letter is being sent to you as the successor organization to IWI.

To emphasize that management must understand the license and assure that its requirements are met, a civil penalty of \$7,500 was proposed.

In your responses you admitted distributing sources from a manufacturer not authorized in the license and distributing "configurations mentioned in the license" [sic], but denied that these were violations of lawful exercise of regulatory authority under the Atomic Energy Act, disagreed with the assessment of the Severity Level, stated that the size of the civil penalty would impose a severe financial hardship on the licensee, argued that NRC standards for imposing penalties are too vague to meet due process standards, and complained that the basic information on which the decision was made has not been made available to the licensee in preparation of its defense.

After consideration of IWI's responses, we have concluded for the reasons given in the Appendix attached to the enclosed Order Imposing Civil Monetary Penalty that the violations occurred as stated and that the civil penalty should be mitigated to \$2,500. Accordingly, we hereby serve the enclosed Order on Innovative Weaponry, Inc. imposing a civil monetary penalty in the amount of \$2,500.

The NRC's Enforcement Policy provides, "... it is not the NRC's intention that the economic impact of a civil penalty be so severe that it puts a licensee out of business (orders, rather than civil penalties, are used when the intent is to suspend or terminate licensed activities) or adversely affects a licensee's ability to safely conduct licensed activities." Therefore, in view of your statement concerning your financial hardship and your suggestion that the NRC should allow payment of the penalty over 18

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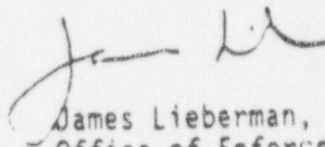
months, we are prepared to permit you to pay this civil penalty over time. If you make arrangements to pay in installments, interest will be assessed and there may be other administrative charges. If you wish to pay in installments, you are to inform Mr. James Lieberman, Director, Office of Enforcement, within 15 days of the date of this letter, and arrange the terms and conditions of payment.

If you choose to pay the civil penalty in full at this time, Section IV of the enclosed Order provides that payment should be made within 30 days of the date of this Order, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States and mailed to James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738.

We will review the effectiveness of your corrective actions during a subsequent inspection.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice", a copy of this letter and the enclosures will be placed in the NRC's Public Document Room.

Sincerely,



James Lieberman, Director
Office of Enforcement

Docket No. 030-30266
License No. 30-23697-01E

Enclosure: As Stated

cc: J. Tourtellotte, Esq.

UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of)
21st CENTURY TECHNOLOGIES, INC.)
successor Licensee to)
INNOVATIVE WEAPONRY, INC.)
Fort Worth, Texas)

Docket No. 030-30266
License No. 30-23697-01E
EA 96-135

ORDER IMPOSING CIVIL MONETARY PENALTY

I

Innovative Weaponry, Inc. [of New Mexico] was the former holder of Materials License No. 30-23697-01E issued by the Nuclear Regulatory Commission (NRC or Commission) and which was amended on April 3, 1995 to name Innovative Weaponry of Nevada (Licensee) as the licensee. The license was subsequently amended to change the name to 21st Century Technologies, Inc., and reissued to reflect a move to Fort Worth, Texas. The license authorized the Licensee to distribute luminous gunsights or weapons containing luminous gunsights in accordance with the conditions specified therein.

II

An investigation of the Licensee's activities was conducted from May 9, 1995 through March 22, 1996. The results of this investigation indicated that the Licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon the Licensee by letter dated May 15, 1996. The Notice states the nature of the violations, the provisions of the NRC's requirements that the Licensee had violated, and the amount of the civil penalty proposed for the violations.

Published at
62 Fed. Reg. 19816
(April 23, 1997)

ATTACHED 9.18

The Licensee responded to the Notice in a Reply and an Answer, both dated October 1, 1996. In its responses, the Licensee admitted that the events that constitute the violations occurred, but denied that these were violations of lawful exercise of regulatory authority under the Atomic Energy Act, asserted that the penalty would cause financial hardship, and disagreed with other aspects of the enforcement process.

III

After consideration of the Licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the NRC staff has determined, as set forth in the Appendix to this Order, that the violations occurred as stated and that the amount of the proposed penalty for the violations designated in the Notice should be mitigated by \$5,000 and a civil penalty of \$2,500 imposed.

IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, IT IS HEREBY ORDERED THAT:

The Licensee pay a civil penalty in the amount of \$2,500 within 30 days of the date of this Order, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States and mailed to James Lieberman, Director, Office of Enforcement, U.S. Nuclear

Regulatory Commission, One White Flint North, 11555 Rockville Pike,
Rockville, MD 20852-2738.

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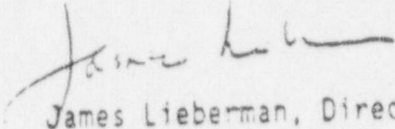
The Licensee may request a hearing within 30 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and include a statement of good cause for the extension. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing" and shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, with a copy to the Commission's Document Control Desk, Washington, D.C. 20555. Copies also shall be sent to the Assistant General Counsel for Hearings and Enforcement at the same address and to the Regional Administrator, NRC Region IV, 611 Ryan Plaza Drive, Suite 400, Arlington, Texas 76011.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the Licensee fails to request a hearing within 30 days of the date of this Order (or if written approval of an extension of time in which to request a hearing has not been granted), the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the Licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

- (a) whether the Licensee was in violation of the Commission's requirements as set forth in the Notice referenced in Section II above, and
- (b) whether, on the basis of those violations, this Order should be sustained.

FOR THE NUCLEAR REGULATORY COMMISSION


James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland
this, 24 day of April 1997

APPENDIX

EVALUATION AND CONCLUSION

On May 15, 1996, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for violations identified during an NRC investigation. Innovative Weaponry, Inc. (Licensee) responded to the Notice on October 1, 1996. The Licensee admitted that the events that were described in the Notice occurred, but denied that these were violations of lawful exercise of regulatory authority under the Atomic Energy Act, asserted that the penalty would cause financial hardship, and disagreed with other aspects of the enforcement process. The NRC's evaluation and conclusion regarding the licensee's requests are as follows:

Restatement of Violations

- 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. (01013)

- 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. (01023)

These violations represent a Severity Level III problem (Supplement VI).
Civil Penalty - \$7,500.

Summary of Licensee's Response to Violations

In its October 1, 1996 "Reply to Notice of Violation," the Licensee admitted that it distributed tritium sealed sources from a manufacturer not mentioned in the license but denied that that was a violation of a lawful exercise of regulatory authority under the Atomic Energy Act of 1954, as amended. The Licensee did not specifically admit or deny the violation of distribution of tritium sealed light sources in configurations not specified or otherwise authorized in the license, but implied admission of that act by use of statements such as "[t]he reason for both actions was inadvertent error" and "[t]he distribution of configurations mentioned [sic] in the license was also made without direct knowledge of corporate management," and further discussed those acts in the context of admitting that the acts occurred. The Licensee denies that either of these activities constitutes a violation of a lawful exercise of regulatory authority under the Atomic Energy Act and relevant case law. The Licensee further argues that the provisions of the license requiring "designation of manufacturers" and "description of the configuration of the gunsights as a condition precedent to distribution" are unlawful because they are beyond the jurisdiction of the NRC to regulate.

In its October 1, 1996 "Answer to Notice of Violation," the licensee denied the violations to the extent and for the reasons set out in its "Reply to Notice of Violation," and enumerated the following as extenuating circumstances: (1) the NRC lacks jurisdiction, (2) there were no adverse consequences to public health and safety, (3) the alleged acts were not intentional and were not [sic] without prior knowledge of management, (4) the alleged acts were self-identified, (5) management attempted to correct the situation immediately on discovery, (6) the Licensee realized no appreciable profit, (7) no accepted philosophy of enforcement is well served by imposing the civil penalty. In addition, the Licensee contended that the acts are of only minor concern rather than "significant regulatory concern."

NRC Evaluation of Licensee's Response to Violations

The Licensee's Reply specifically admitted that the Licensee had distributed tritium sources from a manufacturer who was not mentioned in the license. As to the second violation, distribution of sources in configurations not authorized, the only logical inference that can be drawn from the language of the October 1, 1996 Reply is that the Licensee also admits the facts of that violation. In addition, at the April 23, 1996 Predecisional Enforcement Conference the Licensee conceded that the events described in the Notice had occurred. The Licensee has not challenged the NRC's findings that the unauthorized distributions occurred and has not provided any facts to support such a challenge. Thus, there is no need to further address the factual determinations.

As to the assertion that the conditions or restrictions contained in the license are unlawful due to their failure to ensure public health and safety, the regulations controlling radioactive materials are promulgated under the Act to protect health and minimize danger to life by assuring that licensees will do what is required. The regulations require that sufficient information concerning the sources and the product be submitted prior to issuance of a license, to demonstrate that the product will meet the safety criteria set forth in the regulations for that type of product. Thus, if a licensee manufactures products in unapproved configurations, the NRC has no way of knowing if the product poses a threat to public health and safety. The provisions concerning the specific source and gunsight models listed in IWI's license were not imposed by the NRC; rather, the list of authorized source models, designation of suppliers of tritium sources, and the specific configurations of gunsights came directly from information submitted by IWI to the NRC during the licensing process.

The thrust of the Licensee's disagreement goes to the agency's jurisdiction and the licensing system promulgated under 10 CFR Part 30. Section 81 of the Atomic Energy Act (AEA or Act) provides in part that a person may not transfer or receive, own, or possess any byproduct material except as authorized pursuant to the AEA.

The NRC's jurisdiction under Section 81 of the Act to regulate use of sealed sources containing byproduct material is long-established. Regulations controlling radioactive materials are promulgated under the Act to protect

health and minimize danger to life by endeavoring to ensure that licensees will do what is required to prevent adverse impacts on public health and safety. As noted in the General Statement of Policy and Procedure for NRC Enforcement Actions, (NUREG-1600), Section I (Enforcement Policy), licensees are expected to exercise meticulous attention to detail and maintain a high standard of compliance with NRC requirements. This standard applies even in cases such as this, in which no adverse consequences to public health and safety actually occurred in this matter.

Further, regardless of whether violations were committed with or without the knowledge of Licensee management, a licensee committing a violation is subject to enforcement action. In this case, the Licensee did not make a sufficient effort to be aware of the applicable requirements and ensure that they were met. Section VI.B. of the Enforcement Policy states: "Although management involvement, direct or indirect, in a violation may lead to an increase in the civil penalty, the lack of management involvement may not be used to mitigate a civil penalty."

The claim that the Licensee realized no appreciable profit from the transactions is not relevant to the fact that the licensee violated its license. As to whether this civil penalty serves the purposes of the NRC's enforcement program, it clearly does so. In cases such as this, an NRC enforcement action is used, in part, as a deterrent to emphasize the importance of management being aware of license requirements, and where there is a question as to the meaning of a requirement, of the need to seek clarification. If a licensee believes that license conditions are unwarranted, the licensee should seek an amendment, and comply with the license until the amendment is granted.

Summary of Licensee's Request for Mitigation

The Licensee contends that the enforcement action imposes a severe financial hardship on the Licensee, that the NRC standards for imposing civil penalties are too vague to meet standards of due process, and that the penalty should not be imposed because the basic information on which the decision is being made has not been made available to the Licensee in preparation of its defense.

NRC Evaluation of Licensee's Request for Mitigation

The Licensee sought mitigation complaining that the NRC standards for imposing civil penalties are too vague to meet the standards of due process but did not provide further argument or explanation of that claim. The Congress has provided the Commission with the discretion to issue civil penalties of up to \$110,000 per day per violation. The NRC has for almost 15 years provided publicly available guidelines for developing enforcement actions, including civil penalties. These guidelines are published in the Enforcement Policy.

As to the Licensee's claim that the basic information on which the action was taken was not made available to the Licensee, although the OI Report had not yet been provided to the Licensee because the Licensee had not paid the

required charges,¹ the discussion at the Predecisional Enforcement Conference centered on these violations and how they occurred. Further, during the OI investigation the NRC obtained copies of records from the Licensee, including purchase documents for luminous sources and sales documentation. The nature of the violations cited is such that these documents and the personal knowledge of Licensee employees were clearly the basis for the citations and were available to the Licensee.

The staff has reviewed the assessment of the civil penalty, including the exercise of discretion which escalated the civil penalty to \$7,500. In assessing a civil penalty, the NRC weighs both the potential safety significance and the regulatory significance. While the safety concerns in this matter may not be significant, the regulatory concerns are significant because Licensee management failed to apply the meticulous attention to compliance with license conditions that is required of a licensee. While the NRC remains concerned about management involvement in these violations, the civil penalty has been reconsidered in light of the safety significance of the actual violations. The civil penalty is, therefore, being mitigated by \$5,000.

As to alleged financial hardship, the NRC's Enforcement Policy provides: "... it is not the NRC's intention that the economic impact of a civil penalty be so severe that it puts a licensee out of business (orders, rather than civil penalties, are used when the intent is to suspend or terminate licensed activities) or adversely affects a licensee's ability to safely conduct licensed activities."

Therefore, to balance these considerations and to be responsive to the potential financial hardship to the Licensee, the NRC will allow the Licensee, if it wishes, to pay the civil penalty in monthly installments.

NRC Conclusion

The NRC has concluded that the violations occurred as stated and that the Licensee provided an adequate basis for mitigation of the civil penalty. However, full mitigation is not warranted because of the importance of emphasizing the role of management in ensuring that it understands regulatory requirements and that these requirements are implemented. Here, the new management did not make sufficient effort to ensure compliance. Consequently, a civil penalty in the amount of \$2,500 should be imposed. However, to be responsive to the potential for further financial hardship, the NRC will permit the Licensee to pay the civil penalty in monthly installments.

¹ The OI Report was provided to the Licensee on October 16, 1996.

UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of

Innovative Weaponry, Inc.
Albuquerque, New Mexico

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Docket No. 030-30266
License No. 30-23697-01E
EA 96-170
Notice of Violation

ANSWER TO NOTICE OF VIOLATION

This reply is filed pursuant to 10 C.F.R. § 2.205 in response to a Notice of Violation and Proposed Imposition of Civil Penalty issued by the U.S. Nuclear Regulatory Commission, Office of Enforcement on May 15, 1996. As directed, the licensee, Innovative Weaponry Incorporated (IWI), will address the following four matters in order.

- deny the violation(s) listed in this Notice, in whole or in part
 - demonstrate extenuating circumstances
 - show error in this Notice
 - show other reasons why the penalty should not be imposed
1. Deny the violation(s) listed in this Notice, in whole or in part.

Licensee denies the violations to the extent and for the reasons set out in responses 1 and 2 set out in the Reply to Notice of Violation. Those responses are incorporated by reference.

2. Demonstrate extenuating circumstances.

- a. NRC has no jurisdiction as noted above.

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PUBLIC DOCUMENT RELEASE

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- b. There were no adverse consequences to public health and safety.
- c. The alleged acts were not intentional and were not without prior knowledge of management.
- d. The alleged acts were self-identified.
- e. Management attempted to correct the situation immediately upon discovery and none of the two instances recalled most of the items which were allegedly distributed contrary to license authority.
- f. Licensee realized no appreciable profit by either of the transactions and it is difficult to calculate, probably lost money.
- g. No accepted philosophy of enforcement is well served by the imposition of a penalty. Licensee had to spend tens of thousands of dollars to respond to this matter and suffered lost business in more tens of thousands. This is penalty enough. The licensee understands nuclear regulation is important and does not need an additional penalty to make the point. Anyone who knows the case or bothers to read the public record will know that an example has been set. Additional penalties of \$7,500 will not enhance the fact that the point has been made and a deterrent has been realized. Nor will added penalties contribute to encouragement of prompt identification or prompt comprehensive correction of violations. In fact, in this case, the alleged violations were promptly self-identified and prompt corrective action was initiated.

3. Show error in this Notice.

See again responses 1 and 2 in the Reply to Notice of Violation which are incorporated by reference for the purposes of showing error in the Notice. In addition, licensee asserts that the facts of this case do not warrant Level III action and escalated penalties. The acts were unintentional, posed no radiological risk and had no health or safety effects. Such events surely do not warrant "significant regulatory concern" but are only of minor concern. Indeed, it is inconceivable that the radiation sources involved here could ever be of anything but minor concern in light of the fact that such sources are so radiologically insignificant that they are not regulated beyond distribution.

4. Show other reasons why the penalty should not be imposed.

At page 34,382 of the Federal Register, vol. 60, no. 126 (Friday, June 30, 1995), the Commission stated in reference to materials licensees:

"The primary concerns for these licensed activities are individual radiation exposure and loss of control of material to the environment, both of which warrant a more financially meaningful penalty."

Since this case involves neither individual radiation exposure or loss of control of material to the environment, a "more financially meaningful penalty" is unwarranted.

In addition, the enforcement action has imposed a severe financial hardship on licensee. A fine of \$7,500 poses a serious cash flow problem for licensee. Certainly, the enforcement policy of the Commission is not intended to force companies out of business. There should be no penalty or the NRC should allow the penalty to be paid over a period of

18 months.

Another reason why the penalty should not be imposed is that the NRC standards for imposing penalties are too vague to meet standards of due process.

Finally, the penalty should not be imposed because the basic information upon which the decision is being made has not been made available to licensee in the preparation of its defense.

A handwritten signature in cursive script, reading "James R. Tourtellotte".

James R. Tourtellotte
Attorney-at-Law
Licensee Counsel

Proof of Service

Service is made in accordance with 10 C.F.R. § 2.701 by delivery to the NRC Public Document Room on October 1, 1996.

A handwritten signature in dark ink, appearing to read "James R. Tourtellotte", written over a horizontal line.

James R. Tourtellotte
Attorney-at-Law

UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of

Innovative Weaponry, Inc.
Albuquerque, New Mexico

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)
Docket No. 030-30266
License No. 30-23697-01E
EA 96-170
Notice of Violation

Certificate of Service

I hereby certify that copies of the foregoing Reply to Notice of Violation 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 C.F.R. § 2.701.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Leonard J. Callan, Administrator
Region IV
U.S. Nuclear Regulatory Commission
Harris Tower
611 Ryan Plaza Drive, Suite 400
Arlington, TX 76011

Office of the General Counsel
Mail Stop 0-15 B 18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Dated at Arlington, Virginia, this
1st day of October, 1996.


James R. Tourtellotte
Attorney

UNITED STATES
NUCLEAR REGULATORY COMMISSION

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Notice of Violation

REPLY TO NOTICE OF VIOLATION

This reply is filed pursuant to 10 C.F.R. § 2.201 in response to a Notice of Violation and Proposed Imposition of Civil Penalty issued by the U.S. Nuclear Regulatory Commission, Office of Enforcement on May 15, 1996. As directed, the licensee, Innovative Weaponry Incorporated (TWI), will address the following five matters in order.

- admission or denial of the alleged violation
 - the reasons for the violations, if admitted, and if denied, the reasons why
 - the corrective steps that have been taken and the results achieved
 - the corrective steps that will be taken to avoid further violations
 - the date when full compliance will be achieved
1. Admission or denial of the alleged violation.

Licensee admits that it distributed tritium sealed light sources from a manufacturer not mentioned in the license but denies that this is a violation of a lawful exercise of regulatory authority under the Atomic Energy Act of 1954, as amended.

2. The reasons for the violations, if admitted, and if denied, the reasons why.

The reason for both actions was inadvertent error. The distribution of light sources from manufacturers mentioned in the license took place at the direction of unauthorized personnel without the knowledge of corporate management. The number of distributions was small and had no adverse health or safety effects.

The distribution of configurations mentioned in the license was also made without direct knowledge of corporate management. The number of distributions was small and had no adverse health or safety effects. When discovered, nearly all the configurations were recovered through company recall. The reason for denying that either of these activities constitutes a violation of a lawful exercise of regulatory authority under the Atomic Energy Act of 1954, as amended, has its legal basis in jurisdictional requirements of administrative law, the Atomic Energy Act of 1954, as amended, and relevant case law.

It is black letter administrative law that the powers and authority of administrative officers and agencies are wholly derived from, and defined and limited by, the constitution, statute, or other legislative or organic enactment. Moreover, the powers of administrative officers and agencies are not derived from mere inference, and jurisdiction cannot be conferred by implication, but they generally have such implied powers, and only such, as are necessarily inferred or implied from, or incident to, the powers and duties expressly granted and imposed on them.

Regarding the jurisdiction of the NRC, the U.S. Supreme Court has stated:

"The Commission's prime area of concern in the licensing context, . . . is national security, public health, and safety."

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 550, 98 S. Ct. 1197 (1978). See also Power Reactor Development Co. v. Electrical Workers, 367 U.S. 396, 415, 31 S. Ct. 1529, 1539 (1961); and Pacific Gas and Electric Company, et al. v. State Energy Resources Conservation & Development Commission, et al., 103 S. Ct. 1713 (1983).

This prime directive of the Atomic Energy Act limits the jurisdiction of the Commission to radiation protection matters involving common defense and security or public health and safety.

Even the NRC has recognized its limitations in this regard. In Pacific Gas and Electric, supra, at 1724, the Supreme Court noted:

The Nuclear Regulatory Commission (NRC), which now exercises the AEC's regulatory authority, does not purport to exercise its authority based on economic considerations, 10 CFR § 8.4 (1982), and has recently repealed the regulations concerning the financial qualifications and capabilities of a utility proposing to construct and operate a nuclear powerplant. 47 Fed. Reg. 13751 (1982). In the notice of rule repeal, the NRC stated that utility financial qualifications are only of concern to the NRC if related to the public health and safety.

It appears that the limitations on NRC's jurisdiction in this regard are uncontrovertible.

However, defining NRC jurisdiction in light of other statutory grants of authority poses an interesting question. For example, Section 81 of the Atomic Energy Act directs the NRC to regulate the manufacture, production, transfer, receipt in interstate commerce, acquisition, ownership, possession, import and export of by-product material. Does this mean that the NRC has unlimited powers to regulate these matters? Licensee's position is that the statute does not confer that type of unbridled authority.

Just as the NRC has recognized that financial qualifications and capabilities are only

of concern if related to health and safety, the jurisdiction for regulating matters set out in Section 81 of the Act and similar grants of authority are limited by the extent to which the factual context of those matters concerns radiation protection of public health and safety or, in some instances, common defense and security.

Against this background, licensee's position can be stated in fairly concise terms. First, the provision of the license requiring designation of manufacturers is unlawful because it is beyond the jurisdiction of the NRC to regulate. It is beyond the jurisdiction of the NRC because the designation of the manufacturer is not reasonably related to and has no effect on public health and safety. While the NRC can regulate and prescribe performance based standards for tritium sealed light sources, it cannot limit access to suppliers. Choice of suppliers is an economic matter having to do with business management. It does not materially involve public health and safety.

Second, the provisions of the license requiring description of the configuration of the gunsights as a condition precedent to distribution is unlawful because it is beyond the jurisdiction of the NRC to regulate. It is beyond the jurisdiction of the NRC to regulate because the designation of configuration of gunsights is not reasonably related to and has no effect on public health and safety. While the NRC can regulate and prescribe performance based standards for tritium inserts for gunsights and how those inserts are secured in a gunsight, it cannot designate gunsight configuration or limit distribution of configurations to certain manufacturers. The configuration of a gunsight and its manufacturer are irrelevant to public health and safety. The only conceivable health and safety concern is the integrity of the tritium insert and whether it is affixed to any gunsight in a manner that poses no undue

risk to public health and safety. Gunsight configuration and choice of manufacturer is a business management decision which has nothing to do with public health and safety.

3. The corrective steps that have been taken and the results achieved.

Corrective steps were taken pursuant to the Confirmatory Order issued by the NRC Office of Enforcement on May 15, 1996. The licensee was in compliance with part of the Order prior to May 15, 1996 and subsequently performed all requirements of the Order as required on schedule.

Licensee intends to remain in compliance with the Order even though a Request for Hearing has been lodged with the Commission. Compliance will continue until such time as administrative or legal relief is secured.

4. The corrective steps that will be taken to avoid further violations.

The response here is essentially the same as described in the preceding paragraph.

5. The date when full compliance will be achieved.

The alleged violations were time specific and not an ongoing condition of licensee's operations. To the best of licensee's knowledge, licensee has been in compliance with the license in all other respects.

James R. Tourtellotte
Attorney-at-Law
Licensee Counsel

Proof of Service

Service is made in accordance with 10 C.F.R. § 2.701 by delivery to the NRC Public Document Room on October 1, 1996.

James R. Tourtellotte
Attorney-at-Law

UNITED STATES
NUCLEAR REGULATORY COMMISSION

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I hereby certify that copies of the foregoing Reply to Notice of Violation 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 C.F.R. § 2.701.

Office of Commission Appellate
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Leonard J. Callan, Administrator
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Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Dated at Arlington, Virginia, this
1st day of October, 1996.

James R. Tourtellotte
Attorney