

For further details with respect to this proposed action, see the RG&E application dated July 30, 1998, as supplemented August 18, 1998 and September 14, 1998. These documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and the local public document rooms located at the Penfield Library, State University of New York, Oswego, New York 13126 and at the Rochester Public Library, 115 South Avenue, Rochester, New York 14610.

Dated at Rockville, Maryland, this 16th day of October 1998.

Guy S. Vissing,

Senior Project Manager, Project Directorate I-1, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

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NUCLEAR REGULATORY COMMISSION

[Docket No. 030-32176 License No. 15-27070-01 EA 98-124]

In the Matter of The Terracon Companies, Inc. Lenexa, Kansas; Order Imposing Civil Monetary Penalty

I

The Terracon Companies, Inc. (Terracon or the Licensee), is the holder of Materials License No. 15-27070-01, Amendment 7, issued by the Nuclear Regulatory Commission (NRC or Commission) on April 21, 1997. The license authorizes the Licensee to possess and utilize moisture/density gauges containing sealed sources in accordance with the conditions specified therein.

II

An inspection of the Licensee's activities was completed on February 26, 1998. The results of this inspection 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, 1998. The Notice stated the nature of the violation, the provisions of the NRC's requirements that the Licensee had violated, and the amount of the civil penalty proposed for the violation.

The Licensee responded to the Notice in an Answer to Notice of Violation and a Reply to Notice of Violation, both dated June 9, 1998. The Licensee states that the actions of the technician who

caused the violation constituted "careless disregard of security protocols by a properly trained individual who knowingly violated Terracon policies and NRC regulations," that Terracon had done all that was required by its license, and that the NRC's enforcement action should have been focused on the technician, not Terracon. Terracon also challenges the rationale for the proposed civil penalty as contradictory, in that the NRC gave Terracon credit for its corrective actions in assessing the civil penalty, but cited the need to prevent similar events from occurring.

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 violation occurred as stated and that the penalty proposed for the violation designated in the Notice should be imposed by Order.

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 \$2,750 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.

V

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, DC 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 Secretary, U.S. Nuclear Regulatory Commission, Attn: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Deputy Assistant General Counsel for 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 issue to be considered at such hearing shall be:

Whether, on the basis of the violation admitted by the Licensee, this Order should be sustained.

Dated at Rockville, Maryland, this 19th day of October 1998.

For the Nuclear Regulatory Commission.

James Lieberman,

Director, Office of Enforcement.

Attachment—Appendix

Appendix—Evaluation and Conclusion

On May 15, 1998, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for a violation identified during an NRC inspection. The Terracon Companies, Inc. (Terracon or the Licensee) responded to the Notice by an Answer to Notice of Violation and a reply to Notice of Violation, both dated June 9, 1998. In its responses, the Licensee admitted the violation, but protested the proposed civil penalty. The NRC's evaluation and conclusion regarding the Licensee's response are as follows:

Restatement of Violation

10 CFR 20.1802 states, in part, that the licensee shall control and maintain constant surveillance of licensed material that is in an unrestricted area and that is not in storage. As defined in 10 CFR 20.1003, unrestricted area means an area to which access is neither limited nor controlled by the licensee.

Contrary to the above, on January 23, 1998, the licensee did not control and maintain constant surveillance of licensed material in an unrestricted area. Specifically, the licensee did not maintain adequate control or constant surveillance of a CPN Model MC1-DR portable nuclear moisture/density gauge containing a nominal 8-millicurie cesium-137 sealed source and a nominal 40-millicurie americium-241 sealed source. The licensee failed to secure a padlock on the gauge container, resulting in the theft of the gauge from a vehicle parked at a restaurant. (01013)

Summary of Licensee's Request for Mitigation

Terracon states that the actions of the technician who caused the violation constituted "careless disregard of security protocols by a properly trained individual who knowingly violated Terracon policies

and NRC regulations," that Terracon had done all that was required by its license, and that NRC's enforcement action should have been focused on the technician, not Terracon.

Terracon also challenges the rationale for the proposed penalty as contradictory, in that the NRC gave Terracon credit for its corrective actions in assessing the civil penalty, but cited the need to prevent similar events from occurring as one of the reasons for the penalty.

NRC Evaluation of Licensee's Request for Mitigation

First, the technician informed the NRC inspector during the inspection that he had placed a nuclear moisture/density gauge in its case, had chained and locked the gauge case to the bed of the truck, and had placed a padlock in the hasp of the gauge case, but inadvertently had failed to secure the padlock. The inspection's findings are reflected in the NRC's May 15, 1998 Notice. The NRC did not conduct an investigation to determine whether the technician willfully violated NRC requirements. Had the NRC conducted an investigation and concluded that the technician willfully failed to secure the moisture/density gauge from unauthorized removal, the enforcement sanction against Terracon could have been more significant. Regardless of the cause of the technician's action (i.e., inadvertent error or willful act), a failure to secure NRC-licensed material in a public area is of significant concern to the NRC because of the potential for radiation exposures to members of the public.

Second, as Terracon notes, the "General Statement of Policy and Procedure for NRC Enforcement Action", NUREG-1600 (Enforcement Policy), provides at Section VIII that enforcement actions may be taken against individuals when their conduct is willful and when they fail to take required actions which have actual or potential safety significance. However, the Enforcement Policy also provides that "[M]ost transgressions of individuals at the level of Severity Level III or IV violations will be handled by citing only the facility licensee. More serious violations, including those involving the integrity of an individual (e.g., lying to the NRC) concerning matters within the scope of the individual's responsibilities, will be considered for enforcement action against the individual as well as against the facility licensee." Terracon's suggestion that the technician, and not Terracon, should not be held responsible for the Severity Level III violation, especially when the integrity of the technician was not involved, is contrary to the Enforcement Policy.

Third, notwithstanding the issue of willfulness, the Licensee is responsible for violations caused by its employees, whether arising from inadvertent error or willful acts. The Commission has formally resolved the issue of a licensee's responsibility for violations caused by licensee employees. In *Atlantic Research Corporation*, CLI-80-7, 11 NRC 413 (March 14, 1980), the Commission held that "a division of responsibility between a licensee and its employees has no place in the NRC regulatory regime which is designed to implement our obligation to

provide adequate protection to the health and safety of the public in the commercial nuclear field" and that the licensee is "accountable for all violations committed by its employees in the conduct of licensed activities." *Id.* at 418. The licensee uses, and is responsible for the possession of, licensed material. The licensee hires, trains, and supervises its employees. All licensed activities are carried out by employees of the licensee and, therefore, all violations are caused by employees of the licensee. A licensee enjoys the benefits of good employee performance and suffers the consequences of poor employee performance. To not hold the licensee responsible for the actions of its employees, whether such actions result from incompetence, negligence, or willfulness, is tantamount to not holding the licensee responsible for its use and possession of licensed material. If the NRC were to adopt such a regime, there would be no incentive for licensees to assure compliance with NRC requirements.

Finally, the NRC finds no contradiction between giving Terracon credit for its corrective actions and citing the need to prevent recurrence of the violation as a reason to propose a civil penalty. In the civil penalty assessment process, the NRC routinely considers whether the licensee should be given credit for identification of the violation¹ and for corrective actions, in determining whether a civil penalty should be assessed and, if so, the size of the penalty. See Enforcement Policy, Section VI.B.2. Because the violation in this case was self-disclosing, (e.g., the violation was apparent as a result of the theft of the gauge), credit for identification was not warranted. *Id.* at Section VI.B.2.b. The Licensee was, however, given credit for its corrective actions. Consideration of the identification and corrective action factors yielded a civil penalty of 100% of the base penalty for this Severity Level III violation. The NRC staff found no reason to exercise its discretion to either mitigate or escalate the civil penalty yielded by standard application of the identification and corrective action factors. Nor has the Licensee presented any reason to mitigate the penalty. Once it had been determined that a civil penalty was warranted, there was nothing contradictory about noting that a civil penalty would serve the purpose of preventing similar incidents from occurring. The Enforcement Policy specifies that one of the purposes of civil penalties is to deter future violations. *Id.* at Section V.B. In short, the NRC followed the assessment process of the Enforcement Policy in determining the civil penalty proposed in the Notice.

NRC Conclusion

The NRC concludes that Terracon is responsible for the violation caused by its

¹ The identification factor is considered if a licensee has been the subject of enforcement action for Severity Level III violations within in the past two years or previous two inspections. See Enforcement Policy, Section VI.B.2. Since Terracon had previously been the subject of enforcement action in 1997 for a Severity Level III violation (EA 97-425), the identification factor was considered in this case.

technician, and that the proposed civil penalty was properly assessed in accordance with the NRC's Enforcement Policy. The Licensee has not presented a basis for withdrawal of the violation nor for mitigation of the civil penalty. Consequently, the proposed civil penalty in the amount of \$2,750 should be imposed by Order.

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NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-410 AND 50-244]

Rochester Gas and Electric Corp.; Niagara Mohawk Power Corp.; Nine Mile Point Nuclear Station, Unit 2; R. E. Ginna Nuclear Power Plant; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an Order approving, under 10 CFR 50.80, an application regarding a transfer of control of the operating license for R. E. Ginna Nuclear Power Plant (Ginna) and the operating license for the Nine Mile Point Nuclear Station, Unit No. 2 (NMP2) to the extent held by Rochester Gas and Electric Corporation (RG&E or Applicant). The transfer would be to a holding company, not yet named, to be created over Applicant in accordance with the "Amended and Restated Settlement Agreement" before the Public Service Commission of the State of New York dated October 23, 1997 (Case 96-E-0989) (see Exhibit A in the application dated July 30, 1998). Applicant is licensed by the Commission to own and possess a 14-percent interest in NMP2, located in the town of Scriba, Oswego County, New York, and to wholly own, maintain and operate the R. E. Ginna Nuclear Power Plant located in Wayne County, New York.

Environmental Assessment

Identification of the Proposed Action

The proposed action would consent to the transfer of control of the licenses to the extent effected by Applicant becoming a subsidiary of the newly formed holding company in connection with a proposed plan of restructuring. Under the restructuring plan, the outstanding shares of Applicant's common stock are to be exchanged on a share-for-share basis for common stock of the holding company, such that the holding company will own all of the outstanding common stock of Applicant. The holding company, and not RG&E, would be the owner of any