

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

September 3, 2003 (11:12AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:

Michael C. Farrar, Presiding Officer
Charles N. Kelber, Special Assistant

In the Matter of:
CFC Logistics, Inc.
(Materials License Application)

) Docket No.: 30-36239-ML
)
) ASLBP No.: 03-814-01-ML
)
) Date: August 29, 2003
)
) License Control No. 132825
)
)

**CFC LOGISTICS, INC.'S MOTION FOR REDACTED PLEADINGS AND
CLOSED COURTROOM FOR ORAL ARGUMENT**

CFC Logistics, Inc. (CFC), by its undersigned counsel of record, hereby submits this Motion for Redacted Pleadings and Closed Courtroom for Oral Argument regarding CFC's materials license (No. 132825) for the operation of a Category III irradiator at its cold-storage facility located in Quakertown, PA. For the reasons discussed below, CFC respectfully requests that the Presiding Officer direct NRC Staff and the Licensing Board to redact any references or citations to materials, documents or procedures covered under the protective order dated August 29, 2003, by and between CFC and Petitioners counsel of record and proposed experts (hereinafter the "Protective Order")¹ from all filings or other documents related to this proceeding prior to making them publicly available.

¹ A copy of the Protective Order is attached to this filing as Exhibit A.

Further, CFC respectfully requests that the Presiding Officer order that the proposed oral argument for September 10, 2003, be held in a "closed" courtroom with no access to members of the public or other entities not subject to the Protective Order because allowing such entities to attend the oral argument represents an undue and unacceptable risk of disclosure of protected materials. In addition, CFC respectfully requests that the Presiding Officer prohibit any parties to this proceeding from releasing any documents associated with this proceeding to entities not covered by the Protective Order until a decision is made on this Motion.

I. THE PRESIDING OFFICER SHOULD DIRECT NRC STAFF AND THE LICENSING BOARD TO REDACT ANY REFERENCES OR CITATIONS TO PROTECTED MATERIALS FROM ALL FILINGS OR OTHER DOCUMENTS RELATED TO THIS PROCEEDING PRIOR TO MAKING THEM PUBLICLY AVAILABLE²

First, in light of the disclosure of protected materials under the aforementioned Protective Order to counsel for Petitioners, CFC asserts that it is imperative that NRC Staff and the Licensing Board redact any references or citations to materials, documents or procedures covered under the Protective Order from all filings or other documents related to this proceeding prior to making them publicly available. The materials disclosed to counsel for Petitioners have been accorded confidentiality protection by NRC Staff under 10 CFR § 2.790(a)(4) as "proprietary" or "trade secrets" information. The materials classified as "proprietary" involve physical security plans for the CFC facility which expressly is to be protected from public disclosure. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 11 (1992). The

² For additional discussion regarding the "sensitive" and "proprietary" nature of the security and "trade secrets" documents subject to the Protective Order, *please see* the attached Affidavit of Russell N. Stein, Vice-President and Chief Operating Officer of Gray*Star, Inc labeled Exhibit B.

materials classified as “trade secrets” by NRC Staff involve design and manufacturing drawings related to the CFC Category III irradiator. Such materials may be withheld from the public if the applicant can present a *prima facie* case³ that such materials are “proprietary” in nature. See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-1215 (1985); see also *Commonwealth Edison Co.* (Zion Nuclear Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974).

For example, in cases where confidential or proprietary information is involved, it is well-settled that if the Commission believes that an order contains proprietary information which may be harmful to the party/parties if released to the public, the Commission may withhold the order from public release. See *Power Authority of the State of New York and Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 3 LLC, and Entergy Nuclear Operations, Inc.* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-16, 53 NRC 1 (2001). After the party/parties have reviewed the order and advised the Commission of any confidential information, the Commission will release the order with the appropriate redactions. See *id.*

In the instant proceeding, materials disclosed to counsel for Petitioners have been accorded confidentiality protection under 10 CFR § 2.790(a)(4) as “trade secrets” or “proprietary” information and also have been made subject to the aforementioned Protective Order. Counsel for Petitioners has asserted repeatedly that the subject-matter of these protected materials is crucial to his case, and it logically follows that such protected materials will be referenced at some point in counsel’s future filings. Despite the fact that the *Entergy Nuclear* case involved a Commission order and not a written

³ NRC Staff’s classification of the protected materials as “proprietary” provides a sufficient *prima facie* showing that such materials are, indeed, “proprietary” for purposes of this motion.

pleading, the issue in the instant case is the same. The Commission has designated "proprietary" information as materials which require confidentiality protection and, as such, legal documents (i.e., Commission orders) or, in this case, written filings in this Subpart L proceeding, containing references or citations to such "proprietary" materials must be redacted accordingly, subject to review by the party whose documents has been accorded confidentiality protection. Therefore, based on the precedent set by the *Entergy Nuclear* case and the fact that the protected materials in the instant case involve information which has been accorded confidentiality protection by NRC Staff, CFC respectfully requests that the Presiding Officer direct NRC Staff and the Licensing Board to redact or remove any references or citations to materials, documents or procedures covered under the Protective Order from all filings or other documents related to this proceeding prior to making them publicly available. Further, CFC respectfully requests that the Presiding Officer permit CFC to review such documents and to recommend the appropriate references or citations to be redacted prior to release to the public.

II. THE PRESIDING OFFICER SHOULD ORDER THAT THE PROPOSED SEPTEMBER 10, 2003 ORAL ARGUMENT BE HELD IN A "CLOSED" COURTROOM

Second, in light of the fact that Petitioners may reference or cite part or all of the above-mentioned protected materials during the oral argument, CFC respectfully requests that the Presiding Officer order that the proposed September 10, 2003 oral argument be held in a "closed" courtroom with no access to members of the public or other entities not subject to the Protective Order. According to counsel for Petitioners, the information contained in the protected materials is crucial to his case for demonstrating: (1) that a stay of CFC's materials license is necessary and (2) that they have standing to intervene in

this proceeding. Based on these assertions, it is reasonable to assume that Petitioners may utilize part or all of the information in the protected materials to support their contentions at oral argument.

Since the protected materials have been given confidentiality protection by NRC Staff as “proprietary” information (or “trade secrets”), as the Commission has previously held, portions of a hearing may have to be closed to the public when issues involving “proprietary” information are being addressed. *See Power Authority of the State of New York et al.* (James Fitzpatrick Nuclear Power Plant, Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 292 (2000). Indeed, precautions such as a “closed” courtroom which bars access to entities not covered by the aforementioned Protective Order are necessary to assure protection of the “proprietary” information contained in the protected materials because, where a party to a hearing objects to the disclosure of information on the basis that it is proprietary in nature and makes out a *prima facie* case to that effect, it is proper for an adjudicatory board to conduct further proceedings *in camera*. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-1215 (1985); *see also Commonwealth Edison Co.* (Zion Nuclear Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974).

Further, Commission regulations contemplate that information such as security plans are “sensitive” and are subject to discovery in Commission adjudicatory proceedings only under certain stringent conditions such as: (1) the release of a security plan *must* be subject to a protective order and (2) the requirement that no witness may review a security plan (or any portion of it) without it first being demonstrated that he/she possesses the technical competence to evaluate it. *See Pacific Gas & Electric Co.*

(Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980). Given the fact that security plans, which are a significant portion of the protected materials, are considered "sensitive, proprietary" information by NRC, the disclosure of which is strictly limited to entities and "competent" witnesses subject to a protective order, such materials should be protected from dissemination to members of the public not covered by an appropriate protective order.

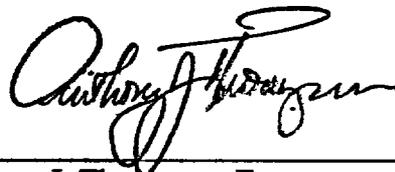
In addition, the remainder of the "proprietary" "trade secrets" documents subject to the same Protective Order are deserving of no less protection. As stated above, the Commission has accorded confidentiality protection sufficient that references to such materials in legal documents to be disclosed to the public are to be redacted before such disclosure is effectuated. *See Power Authority of the State of New York and Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 3 LLC, and Entergy Nuclear Operations, Inc.* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-16, 53 NRC 1 (2001). Since members of the public who potentially may attend the September 10, 2003 will not be subject to the Protective Order entered into by CFC and counsel for Petitioners and their proposed experts, the Presiding Officer should not allow such members of the public to be present at an oral argument where it is likely that "sensitive, proprietary" information, such as the materials subject to the aforementioned Protective Order, will be discussed.

III. CONCLUSION

For the above-mentioned reasons, CFC respectfully requests that the Presiding Officer direct NRC Staff and the Licensing Board to redact any references or citations to materials, documents or procedures covered under the Protective Order by and between

CFC and Petitioners' counsel of record from all filings or other documents related to this proceeding prior to making them publicly available and that the Presiding Officer permit CFC to review such documents and recommend the appropriate references or citations to be redacted. Further, CFC respectfully requests that the Presiding Officer order that the proposed oral argument for September 10, 2003, be held in a "closed" courtroom with no access to members of the public or other entities not subject to the Protective Order because allowing members of the public not covered by such Protective Order to attend the oral argument represents an undue and unacceptable risk of disclosure of protected materials.

Respectfully Submitted,



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Law Offices of Anthony J. Thompson, Esq.
1225 19th Street, NW
2nd Floor
Washington, DC 20036
(o) (202) 496-0780
(fax) (202) 496-0783

COUNSEL FOR CFC LOGISTICS, INC.

EXHIBIT A

Sent By: Anthony Thompson Law;

202 496 0783;

Aug-29-03 11:37AM;

Page 2

AVE. 28. 2895 9:32AM SUSARMAN & ASSOCIATES (SECRET-001)

CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

THIS CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT ("Agreement") entered into as of this twenty-eighth (28th) day of August in the year 2003, by and among CFC Logistics, Inc., a Pennsylvania corporation ("CFC"); Sugarman & Associates, a privately-held entity (Sugarman).

WHEREAS: The Presiding Officer of the NRC's Atomic Safety and Licensing Board in the case of *In the Matter of CFC Logistics, Inc.* (Docket No. 30-35239-ML) (ASLRP No. 03-614-01-ML) has ordered that certain documents be produced,

WHEREAS: CFC and Sugarman intend to provide adequate protections for such documents, and

WHEREAS: CFC and Sugarman intend to enter into a contract providing for such protection,

In consideration of the mutual promises contained herein, the parties, CFC and Sugarman agree as follows:

1. CFC intends to disclose to Sugarman the following proprietary materials, prepared and/or submitted to the NRC in support of CFC's license application for the operation of a Category III irradiator at its cold-storage facility located in Quakertown, PA dated February 19, 2003:

a. The following proprietary drawings, submitted to the NRC:

- CHL: 33248-201-000-REV02**
- CHL: 33248-202-000-REV03**
- CHL: 33248-203-000-REV01**
- CHL: 33248-204-000-REV02**
- CHL: 33248-205-000-REV04**
- CHL: 33248-206-000-REV04**
- CHL: 33248-207-000-REV01**
- CHL: 33248-208-000-REV00**

which currently are labeled as "trade secrets" by NRC under 10 CFR § 2.790 (a)(4).

Sent By: Anthony Thompson Law;

202 498 0783;

Aug-29-03 11:38AM;

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AUG-25-2003 9:33AM SUGARMAN & ASSOCIATES 2125841211

- b. The following proprietary documents, submitted to the NRC with CFC's February 19, 2003 license application: (1) Pages 74 & 75 entitled *Radiation Safety Program - Security* and (2) procedures GI-201 entitled *Source Repositioning*, GI-202 entitled *Source Loading*, and GI-203 entitled *Source Unloading*.

which are currently labeled as "privileged and confidential" by NRC under 10 CFR § 2.798(a)(4).

2. With respect to the materials referenced in Section 1 of this Agreement, such materials (hereinafter "Protected Information") shall include but are not limited to the following: original or reproduced copies of any and all proprietary drawings, documents, procedures or any other proprietary materials disclosed to Sugarman under this Agreement; any legal pleadings, motions, memoranda or other documents or materials prepared or used by Sugarman which include, reference, implicate, cite or, in any other way, mention the Protected Information; and any and all verbal, electronic, printed or other communications which include, reference, implicate, cite or, in any other way, mention the Protected Information.

3. With respect to the Protected Information referenced in Section 2 of this Agreement, Sugarman agrees to:

- a. restrict disclosure of all Protected Information only to Sugarman's employees or representatives with a need-to-know basis and designated experts for such Information for purposes of evaluating the Protected Information and only after advising them of the requirements of this Agreement and having them sign an undertaking in the form of Attachment A agreeing to be bound by the terms of this Agreement;
- b. not disclose any of the Protected Information to any ^{other} third party unless required to do so by law, regulation or legal process and only after notifying CFC and NRC prior to disclosure of the requirement and providing CFC with the opportunity to seek an appropriate protective order;
- c. use the Protected Information only for the purposes of evaluating the CFC license application of February 19, 2003;
- d. use the same degree of care with respect to the Protected Information as it uses to protect its own confidential and private information which standard of care shall be no less than reasonable care;

Sent By: Anthony Thompson Law;

202 496 0783;

Aug-29-03 11:39AM;

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AUG-29-2003 9:33AM SUGARMAN & ASSOCIATES (113004.03)

add for Court appeals

c. return the Protected Information to CFC within 15 days after the date of final NRC action on the CFC license application, including all original and reproduced copies containing Protected Information then in the possession of Sugarman or its representatives or experts and shall ensure the destruction of any summaries, notes or extracts thereof;

4. Should Sugarman desire to rely upon, reference, or cite any of the Protected Information, or part thereof, in any comments to the NRC or other administrative agency or judicial tribunal or proceeding at the NRC or other administrative agency or judicial body in connection with the CFC license application of February 19, 2003, Sugarman agrees to utilize appropriate NRC procedures, including those outlined in 10 CFR § 2.790, to assure that the Protected Information is treated as confidential proprietary information;

5. Sugarman agrees that any threatened or existing violation of this Agreement would cause CFC irreparable harm for which it would not have an adequate remedy at law, and that CFC shall be entitled to seek immediate injunctive relief prohibiting such violation in addition to any other rights or remedies. If a party is liable to the other on account of this Agreement, the measure of damages shall include any amount for indirect, incidental, consequential or punitive damages and/or lost profits.

6. The parties recognize that the NRC has been asked by CFC to decide on the confidential status of the Protected Information, and all parties will undertake to provide the level of confidentiality determined by the NRC to be appropriate. CFC, Sugarman, and NRC each has the right to seek changes in the level of confidentiality to be afforded by the NRC, subject to the following:

- a. Nothing in this Agreement shall be deemed to preclude Sugarman from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Agreement. Accordingly, nothing in this Agreement shall be deemed to preclude any party in any other administrative or judicial proceeding from seeking protected status for any such information or materials;
- b. Nothing in this Agreement shall be deemed to preclude any party from pursuing any available administrative or judicial appeals with respect to any NRC decision regarding the appropriate confidential treatment to be afforded the Protected Information by the NRC under 10 CFR § 2.790. If, at any time, the NRC finds that the Protected Information need not be protected, Sugarman agrees that the Protected Information will continue to be protected under this Agreement for an additional (30) days pending an appeal of the NRC decision. Nothing in this Agreement shall be deemed to preclude any

Sent By: Anthony Thompson Law;

202 496 0783;

Aug-29-03 11:38AM;

Page 5/6

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party from seeking additional administrative or judicial appeals of NRC decisions with respect to the confidential treatment of Protected Information;

7. This Agreement shall be governed and construed in accordance with the laws of the State of Pennsylvania, without giving effect to its principles of conflict of laws. The parties shall submit to the exclusive jurisdiction of the State and federal courts located in the State of Pennsylvania for any dispute arising out of this Agreement.

8. If any provision of this Agreement is held to be illegal, invalid or unenforceable, such provision shall be fully severable and this Agreement shall be construed as if the illegal, invalid or unenforceable provision had never been a part of this Agreement and the remaining provisions of this Agreement shall be given full force and effect.

9. No party shall assign its right or delegate its duties hereunder to a third party without the prior written consent of the other party.

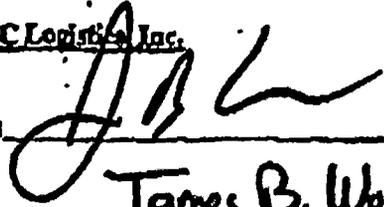
10. a. Gray*Star and CHL shall retain all rights, title, and interest in and to the Protected Information referenced under Section 1(a) of this Agreement that is transmitted subject to this Agreement.

b. CFC shall retain all rights, title, and interest in and to the Protected Information referenced under Section 1(b) of this Agreement that is transmitted subject to this Agreement.

11. This Agreement shall become effective as of the date first written above. This Agreement contains the entire agreement between the parties concerning the confidentiality and non-disclosure of the Protected Information and no modifications of this Agreement or waiver of its terms and conditions shall be binding unless agreed to in writing by each party hereto.

12. The parties agree that its representatives executing this Agreement have the full and complete authority to bind all members of its organization, agency, or company.

CFC Logistics Inc.

By: 
Name: James B. Wood

Title: President

Sent By: Anthony Thompson Law;

202 498 0783;

Aug-29-03 11:38AM;

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Aug-29-2003 9:34AM SUGARMAN & ASSOCIATES 213064291

Sugarmen & Associates

By: 

Name: Robert J Sugarmen

Title: Attorney

EXHIBIT B

Affidavit

I, Russell N. Stein, being duly sworn, depose and state as follows:

- (1) I am the Vice President and Chief Operating Officer of GRAY*STAR, Inc. ("GRAY*STAR") at 200 Valley Rd., Ste. 103, Mt. Arlington, New Jersey.**
- (2) Further, I am the chief designer of the Genesis Irradiator(tm) and responsible for all security aspects of the unit including recommended security features for its operation.**
- (3) GRAY*STAR has requested that CFC Logistics, ("CFC LOGISTICS"), the applicant for a Material License for a Genesis Irradiator, keep certain information in confidence and on a "need to know" basis. Specifically:**
 - a. Pages 74 & 75 of the Application, "Radiation Safety Program - Security". (Request made under Affidavit by CFC Logistics.)**
 - b. Procedures 201, 202 & 203 that involve specific source handling instruction. (Request made under Affidavit by CFC Logistics.)**
 - c. Manufacturer's Drawings: (Request made under Affidavits by both CFC Logistics and GRAY*STAR.)**

**CHL: 33248-201-000-REV02
CHL: 33248-202-000-REV03
CHL: 33248-203-000-REV01
CHL: 33248-204-000-REV02
CHL: 33248-205-000-REV04
CHL: 33248-206-000-REV04
CHL: 33248-207-000-REV01
CHL: 33248-208-000-REV00**

- (4) GRAY*STAR maintains that item a. above is directly related to security information. The release of this information could greatly reduce the security of the unit and to best protect the public should NOT be disclosed to the public. Any release of this information should be on a "need to know" basis. The information specifies security areas concerning the physical security of the facility, security training and security review of operators and physical security of the irradiator itself.**
- (5) GRAY*STAR maintains that item b. is directly related to security information. These procedures describe the steps for safely removing the radioactive sources. This information, if made public, could greatly reduce the time required for source removal by a person or persons attempting unauthorized source removal. The**

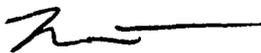
release of this information could reduce the security of the unit and to best protect the public should NOT be disclosed to the public. Any release of this information should be on a "need to know" basis.

- (6) Item c. material is defined by GRAY*STAR as "Trade Secret" information; however, the disclosure of this material could also reduce the security of the unit. These are defined as Trade Secrets because they are manufacturing drawings. The information contained in these drawings could be used to facilitate an act to do harm to the irradiator.
- (7) Robert J. Sugarman, associates and the people he represents have not been vetted to receive this information.
- (8) All of the above material should not be released without the review of the ASLB.

I Russell N. Stein, being duly sworn, deposes and says:

That he has read the foregoing affidavit and the matters stated therein are true and correct to the best of his knowledge, information and belief.

Executed at Morris Township, New Jersey, this 28th. day of August, 2003.



Russell N. Stein
Vice President
GRAY*STAR, Inc.

Subscribed and sworn before me this 28th day of August, 2003

Megan E. Branchett:

Notary Public, State of New Jersey

My Commission Expires 01.19.2005

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

**Michael C. Farrar, Presiding Officer
Charles N. Kelber, Special Assistant**

In the Matter of:
CFC Logistics, Inc.
(Materials License Application)

)
)
) Docket No.: 30-36239-ML
)
) ASLBP No.: 03-814-01-ML
)
) Date: August 29, 2003
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing CFC Logistics, Inc.'s Motion for Redacted Pleadings and Closed Courtroom for Oral Argument in the above-captioned matter has been served upon the following via electronic mail, facsimile and U.S. First Class Mail on this 29th day of August, 2003.

- | | |
|---|---|
| 1. Robert J. Sugarman, Esq.
Sugarman & Associates, P.C.
100 North 17 th Street
Philadelphia, PA 19103
Facsimile: 215.864.2501
Email: RJSugarman@aol.com | 2. Office of the Secretary
Attn: Rulemaking and Adjudication
Staff
U.S. Nuclear Regulatory
Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20851
Facsimile: 301.415.1101
Email: secy@nrc.gov |
|---|---|

3. Stephen H. Lewis, Esq.
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Facsimile: 301.415.3725
Email: shl@nrc.gov

4. Administrative Judge Michael C. Farrar
Presiding Officer
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Mail Stop #T-3 F23
Washington DC 20555-0001
Facsimile: 301-415-5599
Email: mcf@nrc.gov

5. Dr. Charles N. Kelber
Special Assistant
Atomic Safety and Licensing Board
Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory
Commission
Washington, DC 20555-0001
Facsimile: 301.415.5599
Email: cnk@nrc.gov

6. Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

7. Atomic Safety and Licensing Board
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August 29, 2003

BY ELECTRONIC, FACSIMILE AND U.S. FIRST CLASS MAIL

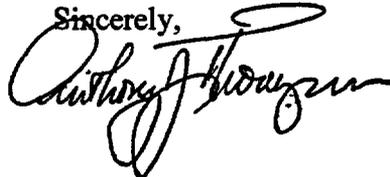
U.S. Nuclear Regulatory Commission
Office of the Secretary
Attn: Rulemaking and Adjudications Staff
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Re: In the Matter of: CFC Logistics, Inc.
Docket No: 3036239-ML
ASLBP No. 03-814-01-ML

Dear Sir or Madam:

Please find attached for filing CFC Logistics, Inc.'s Motion for Redacted Pleadings and Closed Courtroom for Oral Argument in the above-captioned matter. Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped copy in the self-addressed, postage prepaid envelope attached herewith.

If you have any questions, please feel free to contact me at (202) 496-0780. Thank you for your time and consideration in this matter.

Sincerely,


Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Law Offices of Anthony J. Thompson, P.C.
Counsel of Record to IUSA

Enclosures