UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7362 **DOCKETED 02/17/04**

ATOMIC SAFETY AND LICENSING BOARD PANEL

SERVED 02/17/04

Before Administrative Judges:
Michael C. Farrar, Presiding Officer
Dr. Charles N. Kelber, Special Assistant

In the Matter of	Docket No. 30-36239-ML
CFC LOGISTICS, INC.	ASLBP No. 03-814-01-ML
(Materials License)	February 17, 2004

PREHEARING ORDER
(Regarding NRC Staff Participation and Other Matters)

We took two steps in December toward the resolution of this matter, which involves the validity of CFC Logistics' operation of a cobalt-60 irradiator at its food storage warehouse in the vicinity of Quakertown, Pennsylvania, about which we have previously published two decisions.[1] The first step was to participate in another site visit, the principal purpose of which was to give the intervenors' expert witness -- who had been unable to participate in the earlier visit -- the opportunity to observe the facility and to ask representatives of CFC and of the manufacturer questions about it. That second site visit (which, like the first, was not open to the public) was attended by counsel for both parties as well as by several intervenors and prospective intervenors.

The second step, later the same day, was to hold a prehearing conference at a nearby off-site meeting room. That conference was open to the public, and some 50 nearby residents did attend as observers. The Company and the intervenors were both represented by counsel at the conference; in contrast, as indicated in our unpublished December 2 Order (p. 1, n. 1), the NRC Staff had, as is its right, elected not to participate in that phase of the proceeding.

[1] LBP-03-16, 58 NRC 136 (September 23, 2003) (denying motion for stay); and LBP-03-20, 58 NRC 311 (October 29, 2003) (holding that at least some petitioners had standing to intervene to oppose the facility and that a number of their proffered "areas of concern" were germane to the proceeding).

The prehearing conference involved essentially four matters: (1) lengthy oral arguments on two pending motions the intervenors had filed (see Tr. 337-38, 339-415); (2) brief reflections upon the possibility that the case could be settled (see Tr. 338, 415-24); (3) sequential discussions of each of the intervenors' substantive "areas of concern" that we had found germane (see LBP-03-20 (n. 1 above), 58 NRC at 323-33), with an eye toward -- as we had said in our November 19 Order (p. 4) -- "narrowing, clarifying or focusing" the issues embraced in those concerns (see Tr. 338, 428-58, 464-68); and (4) quick estimates of the time the parties would need to file their substantive written presentations on those issues once rulings on the pending motions had cleared the way for the merits to be heard (see Tr. 458-64, 468-69).

In this Order, we recap certain of the decisions made at the conference and, as contemplated by those decisions, give the parties -- including the NRC Staff -- directions as to future filings and other activities. As indicated at the conference (see Tr. 368, 399, 424-25, 427, 461), our rulings on the pending motions (see #1, above) must await our receipt of further briefs on key issues.

Staff Brief and Responses. During the oral arguments, it became clear to us that the views of the NRC Staff were needed both on (1) the stay motion and on (2) the related motion dealing with certain documents. In that regard, although electing not to participate in the prehearing conference (see Nov. 12 Tr. at 318; compare id. at 308), the Staff had at first indicated it would participate in the briefing of the pending stay motion but then opted not to do so.[2] Exercising the authority granted us by 10 C.F.R. § 2.1213, we now hereby direct the Staff to furnish us its views on both pending matters, whose resolution we believe -- in the words of the Rule (see also Tr. 298-300) -- "would be aided materially" by the Staff's briefing of the issues raised by the other parties' written and oral arguments.[3]

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[2] Compare Nov. 12 Tr. at 298-300, 314, with Staff email of Nov. 21 and attached letter.

[3] On the general matter of Staff participation herein, see LBP-03-16 (n. 1 above), 58 NRC at 138, 148 and LBP-03-20 (n. 1 above), 58 NRC at 334, n. 35, and 337, n. 42. The Staff is, it should be noted, already participating in two particular matters, i.e., those dealing with the facility's security and with its decommissioning bond (see Tr. 335, 339, 428 and Nov. 21 email).

On that score, during the prehearing conference we extended to the other parties the opportunity to provide us, within the next several days thereafter, their suggestions as to questions that the Staff might be called upon to address in the course of responding to the pending motions. Both parties took that opportunity. To the extent that the questions they suggested are material to the matters before us, we are posing them to the Staff, either in the form propounded by the respective party or as we have reformulated or otherwise edited them. Accordingly, the Staff should in its brief address, in addition to any other matters it wishes to discuss, the matters listed in the Appendix to this Order (pp. 7-9, below). Subject to any extension of time the Staff may request, that brief is to be filed by Friday, February 27, 2004.[4]

In response to the Staff's brief, the Company may either (1) file, within a week after the Staff's electronic filing, a brief commenting on the Staff's position,[5] or (2) let us know no later than that time that it elects not to file anything additional. The intervenors will then have one week from the date of the Company's electronic submission (of either a commentary or a "no-file" election) to file its response to the Staff's brief and any additional Company arguments).

Decommissioning Bond. Turning to a subject not discussed at the most recent prehearing conference but covered in a prior decision (LBP-03-20, n. 1 above, 58 NRC at 333, Item 7), we have determined that the brief the Staff previously filed, on matters related to the decommissioning bond "area of concern" raised by the intervenors, leaves some key questions unanswered. Accordingly, the Staff is to file, within one week after it submits the brief described above, a supplemental brief on the intervenors' decommissioning bond issue addressing the matters italicized below:

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[4] We note in passing the Licensing Board Panel's experience that the Staff at least occasionally elects to participate in other Subpart L proceedings that may be of greater or lesser apparent import than the matters involved here. If the Staff wishes to reconsider its decision not to participate fully before us (see n. 3, above), it is of course free to do so; if it adheres to its current stance, we will continue to direct it to participate when warranted.

[5] If, contrary to our assumption, it turns out that the Company will need to take serious issue with the Staff's brief, it may either do so within the time period set out herein or seek a time extension.

In its initial brief related to decommissioning bonds, the Staff responded to our questions about another facility in Pennsylvania that was the subject of an NRC press release (see 58 NRC at 333, above, n. 29) by reciting certain facts about that facility. That recitation left unclear precisely how the conditions at that other site when it faced decommissioning might, or might not, be expected to differ from conditions that might -- in light of the sources to be used and the operations to be conducted -- be expected at this site when it faces decommissioning.[6] Given the relatively large decommissioning expenses incurred at the other site, the Staff should address thoroughly the reasons why the nature and operation of the facility that existed thereon are, or are not, thought to be analogous to the nature and proposed operation of the facility before us herein. To the extent that the other site and facility are analogous, the Staff should go on to address whether the similarities between them would call for us to send to the Commission the questions of whether (1) the decommissioning bond regulations -- cited by the other parties as a reason to reject the intervenors' position -- can be expected in this instance to serve the purpose for which they were intended or (2) special circumstances exist that would make the applicability of those regulations inappropriate in this instance. See 10 C.F.R. §§ 2.1209(d), 2.1239(b), 2.1251(d). If we took such a step, the ultimate question for the Commission would be, of course, whether an exception from the regulations regarding bond amounts, which the Staff and the Company believe call for the rejection of the concerns the intervenors raised, should be made in this matter. In this regard, the Staff may wish to expand upon its abbreviated reference to the new financial assurance rule (68 FR 57327, October 3, 2003) by explaining with some specificity its future application herein.

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[6] To be sure, the Staff did point to the fact that the operator of the other Pennsylvania site was in bankruptcy when that costly decommissioning loomed. While the operator's bankruptcy explains why the State and federal governments had to undertake that decommissioning themselves, it sheds no light on the issues still of concern to us, namely, (1) what had transpired on that other site during its lifetime that had brought about the need to incur decommissioning expenses that are so disproportionate to the amount of the initial bond sought of the Company here, and (2) what are the similarities, if any, between that site/facility and the site/facility before us.

Possible Settlement. The matter of the possible settlement of this proceeding, and the appointment of a settlement judge, has been broached and discussed on several occasions thus far herein. See, e.g., LBP-03-20 (n. 1 above), 58 NRC at 336, and Tr. 415-24. Our request that a settlement judge be appointed, and the reasons for that request, are being made the subject of a separate order.

Further Proceedings. Upon receipt and preliminary analysis of the supplemental briefs called for by this Order, we will promptly convene a prehearing conference call to discuss the steps needed to get to a resolution of the merits of all the issues pending in the proceeding.[7] In addition to finalizing the nature and timing of the written presentations on the issues discussed at the most recent conference (see Tr. 458-64, 468-69), we will need to discuss with the parties the manner in which best to proceed on two other matters: (1) the security issues, where public disclosure of information is to be avoided; and (2) the decommissioning bond issue, where a preliminary legal ruling has the potential to be dispositive.

In calling herein for further filings from the Staff, we are not unmindful of the intervenors' objection that, as a party to the proceeding, the Staff should not be given second opportunities to state its position when such opportunities are not freely available to other parties (see, e.g., Tr. 353-54, 407-09, 426, 427). The answer to that objection is found in what we have addressed at other times, i.e., the special role the Staff has to protect the public interest, and the concomitant importance that inheres in its expression of its position, whether or not we

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[7] Prior to that time, we will issue an order formalizing the determinations made at the conference (Tr. 428-58, 464-68) to reformulate and consolidate the various "areas of concern." Although we did not indicate at the conference that such an order would be necessary, upon reflection we believe formalizing the determinations and incorporating any additional guidance we may have would be beneficial in bringing precision and focus to the parties' presentations. See also 10 C.F.R. § 2.1233(a).

eventually subscribe to the merits of that position. See Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-03-04, 57 NRC 69, 139-41 (2003) [a decision in which we rejected important aspects of the Staff's position] and cases cited therein.

We need not rehearse our thoughts on that subject here. We simply pause to point out (1) to the intervenors that it is that special Staff role that demands that, at least on important issues, we have the benefit of the Staff's thinking, and (2) to the Staff that, precisely because of that special role, we expect all of its filings with us to be thoughtful and thorough, both from a legal and from a technical perspective (see also Tr. 393-94, reflecting the intervenors' similar view on a related matter).[8]

It is so ORDERED.

BY THE PRESIDING OFFICER

/RA/

Michael C. Farrar *
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 17, 2004

* Although Judge Kelber has been assisting me during this entire proceeding, he was not available to review the contents of this Order.

Copies of this Order were sent this date by Internet e-mail transmission to counsel for (1) CFC Logistics; (2) Intervenors; and (3) the NRC Staff.

[8] We also note that we have given the intervenors (and the Company) the opportunity to reply to the anticipated Staff filings (see p. 3, above), thereby in effect insuring that the Staff's so-called "second chance" to be heard does not put the other parties at a disadvantage.

APPENDIX:
QUESTIONS FOR THE NRC STAFF TO ADDRESS
IN ITS BRIEF ON THE PENDING MOTIONS

A. Background. In support of a stay, the intervenors assert that the terms of the sales contract refer to the irradiator as a "prototype" and thus render its operation experimental.

Questions:

1. Was the Staff aware of all of the terms of that contract when it approved the license?
2. If so, why did the Staff conclude that those contract terms did not require denial or conditioning of the license (and by extension thus do not now support the grant of the requested stay motion)?
3. If not, does the Staff believe that those contract terms do support the grant of the requested stay motion?

(In responding to the above questions, the Staff should indicate what "prototypical" differences exist between this irradiator and those previously licensed and whether those differences have health and safety consequences, as opposed to only production efficiency consequences.)

B. Background. The intervenors assert that certain statements by the irradiator designer and by a Company contractor indicate that a particular aspect of the irradiator created an unsafe condition. See, e.g., Exhibit C to stay motion. Prior to the receipt of any cobalt sources, the Company arranged for that condition to be changed to eliminate the assertedly unsafe condition. The NRC Staff rejected as inadequately supported, however, the Company's application for a license amendment to incorporate that change. The Company thereupon undid the change, putting the irradiator back in its original, assertedly unsafe, condition.

Questions:

1. At what point was the Staff aware of the Company contractor's and the irradiator designer's expressed safety concerns?

2. What is the Staff's current position as to the safety of the above-mentioned condition and what is the basis for that position? (See also Tr. 299-300, where the Staff at one point agreed to address similar matters.)

C. Background. The Rules of Practice prohibit discovery in proceedings of this nature. In lieu thereof, the NRC Staff prepares and files a "hearing record" presumably containing the documents upon which the Staff based its determination to award the license.

Questions:

1. Were any of the documents and/or information now sought by the intervenors considered by the NRC Staff when it passed on the validity of the license?
2. If so, why are they not part of the hearing file? If not, why are they not relevant to a determination of the validity of the license?
3. Based on the answers to the above questions, what action does the Staff urge us to take on the intervenors' document-related motion, given the language and purpose of the rules applicable to proceedings of this nature?

D. Background. As noted above, the parties at our request submitted their suggestions as to questions that the Staff might address in responding to the pending motions, to which full set of suggestions we draw the Staff's attention (see the Intervenors' December 15 "Questions to the Staff" and the December 16 "Response of CFC Logistics, Inc. to Presiding Officer's Request . . ."). Some of those suggestions are embraced within the questions we have propounded above. Others of the suggested questions, some edited by us, are set out below. As to those below, the Staff should either address them (at its option combining some of them with the matters covered in ¶ B, above) or indicate why it believes it unnecessary or inappropriate to do so. As to the remaining submitted questions, not listed here, the Staff may -- if it wishes -- also address any of them for the purpose of putting the basis for its regulatory judgments on the record if it believes that would aid us in addressing the pending motions.

Questions:

1. Was a record made of Reviss' expressed concerns about irradiator safety; if not, why not?
2. Did the Staff address the merits of Reviss' concerns and, if so, what determinations were made thereon and where are those determinations reflected? If not, do those concerns now need to be addressed?
3. What consequences should flow from an irradiator licensee's unapproved modification of its facility when no source is present and what steps does the Staff take to approve the return of the facility to its original condition?
4. (*Unedited*) "Where is the heat calculation for the full load of sources in operation? Are you willing to release it? Please advise whether you will release all assumptions and input which formed the basis of the calculation."

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	)	
(Materials License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB PREHEARING ORDER (REGARDING NRC STAFF PARTICIPATION AND OTHER MATTERS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of February 2004