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NUCLEAR REGULATORY COMMISSION

Title: CFC Logistics, Inc.

Docket Number: 30-36239-ML; ASLBP No.: 03-814-01-ML

Location: Rockville, Maryland

Date: Tuesday, March 23, 2004

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

3 + + + + +

4 ATOMIC SAFETY AND LICENSING BOARD

5 (ASLB)

6 + + + + +

7 PRE-HEARING TELECONFERENCE

8 _____

9 In the Matter of:

10 CFC LOGISTICS, INC. Docket No. 30-36239-ML

11 ASLBP No. 03-814-01-ML

12 Materials License

13 _____

14 Tuesday, March 23, 2004

15

16 Nuclear Regulatory Commission

17 T3-C5, Two White Flint North

18 11545 Rockville Pike

19 Rockville, Maryland

20

21 The above-entitled matter came on for hearing,

22 pursuant to notice, at 3:00 p.m.

23 BEFORE ADMINISTRATIVE LAW JUDGES:

24 MICHAEL C. FARRAR Presiding Officer

25 CHARLES N. KELBER Special Assistant

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1 Also Present:

2 Marvin Resnikoff, Ph.D.

3 Amy Roma

4 Chris Walker

1 P-R-O-C-E-E-D-I-N-G-S

2 3:03 p.m.

3 JUDGE FARRAR: This is a pre-hearing
4 conference in the CFC -- pre-hearing conference call
5 in the CFC Logistics matter. Three o'clock on
6 Tuesday, March 23. This is Mike Farrar at the Nuclear
7 Regulatory Commission headquarters. I'm the presiding
8 officer in the case. Dr. Kelber, my special
9 assistant, is here with me, as is Amy Roma, our law
10 clerk whom you all met up in Pennsylvania in December.
11 MR. PUGSLEY: Good afternoon.
12 JUDGE FARRAR: And Chris Walker who's
13 recently joined us also serving in a law clerk
14 capacity.
15 Mr. Sugarman, would you introduce
16 yourself, please?
17 MR. SUGARMAN: Yes. I'm Robert Sugarman
18 representing the Intervenors.
19 JUDGE FARRAR: All right. And on another
20 line is your technical expert, Dr. Marvin Resnikoff;
21 is that correct?
22 MR. SUGARMAN: That's correct.
23 JUDGE FARRAR: Okay. Mr. Pugsley?
24 MR. PUGSLEY: Christopher Pugsley, CFC
25 Logistics.

1 JUDGE FARRAR: And I believe you told us
2 before we went on the record that Mr. Thompson was
3 otherwise occupied and would not be joining us?
4 MR. PUGSLEY: To the best of my knowledge,
5 yes, that's correct.
6 JUDGE FARRAR: Okay. And Mr. Lewis?
7 MR. LEWIS: Stephen Lewis, Counsel for NRC
8 staff.
9 JUDGE FARRAR: And you said you were going
10 to have no one else with you?
11 MR. LEWIS: No. Correct, no one else.
12 JUDGE FARRAR: All right. Let's get
13 started. In an email yesterday, I talked about at
14 least three things we wanted to discuss today. A lot
15 has happened in the last few days, and the first thing
16 is to have an update on the status of the matters that
17 were raised by the Intervenor's March 15 motion and
18 covered in the Company's two filings to be sure
19 there's a common understanding of the current
20 situation.
21 As I understand it, Mr. Pugsley, you've
22 talked to not only your client but to the various
23 suppliers, and the documents that you claimed as
24 proprietary in your March 5 and March 12 filings are
25 now -- you're able to release that proprietary status?

1 MR. PUGSLEY: That's correct.

2 JUDGE FARRAR: All right. And just so

3 we're sure of the interrelationship, CFC Logistics, of

4 course, is the owner of the irradiator and current

5 licensee. GrayStar is the manufacturer and that's who

6 Mr. Stein works for if I remember correctly; is that

7 right?

8 MR. PUGSLEY: Judge Farrar, GrayStar is

9 the irradiator designer, not the manufacturer.

10 JUDGE FARRAR: Who puts it together?

11 MR. PUGSLEY: There's another firm called

12 CHL that actually built it. But GrayStar is the

13 irradiator designer.

14 JUDGE FARRAR: Okay. CHL builds it, and

15 can you define for us Reviss' role?

16 MR. PUGSLEY: Reviss Services Limited is

17 the cobalt -- the registered sealed source provider,

18 or supplier as you put it before, for CFC Logistics

19 irradiator.

20 JUDGE FARRAR: Okay. If something were to

21 go wrong in the irradiator, would CHL and Reviss and

22 GrayStar would all work together on it; is that how it

23 works?

24 MR. PUGSLEY: Well, as a licensee, CFC

25 Logistics is primarily responsible for the management

1 of atomic energy materials, i.e. cobalt-60. So they
2 are responsible for any action that needs to be taken
3 under its license.
4 JUDGE FARRAR: Right. But as a practical
5 matter, your client would look to all three of these?
6 MR. PUGSLEY: Depending on the situation.
7 JUDGE FARRAR: Right. Okay. Mr.
8 Sugarman, now that the Company has released the
9 proprietary status, tell us how you see the situation.
10 And we did just get your filing of today, your brief
11 interim filing.
12 MR. SUGARMAN: Well, I would request, as
13 I did, that we would have at least another ten days to
14 respond. Ten days I think would be adequate unless
15 Dr. Resnikoff needs more time. But I think ten days
16 would do it for now to make a response to the CFC
17 submissions and the staff submissions.
18 JUDGE FARRAR: Okay. So that would be on
19 both the stay motion and the related relief and on the
20 decommissioning bond issue.
21 MR. SUGARMAN: Right.
22 JUDGE FARRAR: Then why don't we -- and if
23 I remember right you had a problem with Dr. Resnikoff
24 being out of the country or somewhere up until now,
25 but now, Dr. Resnikoff, you're available over this

1 next ten days?

2 DR. RESNIKOFF: Yes, I am.

3 JUDGE FARRAR: All right. Then why don't

4 this Friday, April 2 -- Mr. Sugarman, is that --

5 MR. SUGARMAN: That's fine with me.

6 Again, Dr. Resnikoff is on the call and I know he'll

7 tell me if I'm going off base here.

8 DR. RESNIKOFF: Yes, that's fine.

9 JUDGE FARRAR: All right. Then we'll look

10 for your briefs on both matters at that time.

11 Now, you had asked in your previous motion

12 and you cover it in today's filing for sanctions, tell

13 us where we stand on that, in your mind.

14 MR. SUGARMAN: Well, I only intervened on

15 that subject because I knew the conference was

16 upcoming and you had raised the question as to kind of

17 an aside, and I didn't know whether you wanted to

18 address today but I thought I should give you as much

19 advance notice of what I consider to be the general

20 legal authority that you have.

21 As far as the merits of the sanction

22 motion, I don't now if you want me to address them

23 right now. I'd be happy.

24 JUDGE FARRAR: Well, without going into

25 great length because if we pursue the sanctions, then

1 we'd want to give the Company and the staff a chance
2 to file a brief, but tell us given that the Company
3 has now released the proprietary status so that you're
4 free to use the documents and show them to other
5 people as you prepare your response on the merits of
6 those motions, would sanctions would you still be
7 seeking, if any, at this point?
8 MR. SUGARMAN: Well, it's a matter of
9 compensator and punitive sanctions. The compensatory
10 sanction relates to the fact that we're still briefing
11 this issue in March, whereas it was intended that the
12 briefing be completed in November. And the
13 consequence of that is we're expending considerable
14 counsel time and expert time at the expense of the
15 citizens who are being asked to -- are having to, I
16 shouldn't be asked, but are having to extend
17 themselves unnecessarily.
18 The Board directed CFC to respond to our
19 stay motion and everything else back in November, and
20 the proliferation of materials that are coming forth
21 at this time there's no justification for why those
22 materials should not have or were not encompassed
23 within the Board's previous order. People can't just
24 file -- in my experience with the NRC, can't just file
25 more briefs all the time.

1 They got permission from the Board over
2 our objection to file yet another brief in response to
3 the staff, and that was a now thing. Instead of
4 filing anything in response to the staff, they went on
5 to say things that if they were going to be said could
6 have been said in November. There wasn't a thing in
7 there that dealt with anything that the staff said in
8 its latest submissions. It maybe dealt with what the
9 staff said in November, but that was all swept into
10 what happened in December.
11 These new filings are completely
12 irrelevant, are completely cumulative or independently
13 of anything the staff said. They don't question the
14 staff, they don't undermine what the staff said,
15 they're just completely off on a different tangent;
16 maybe not every word but a lot of it is. And there's
17 some basic unfairness in them perverting a narrow
18 ruling, a narrow permission into saying what they
19 wanted to say, and it's not fair, it's not a fair way
20 to litigate, and that's one of the purposes of
21 sanctions.
22 So the compensatory aspect is that we've
23 been put through a lot of litigation that we shouldn't
24 have had to be put through because they chose to
25 withhold information until they decided they wanted to

1 release it. That specifically -- you know,
2 particularly relates to the Reviss letters and all the
3 discussion about the Reviss letters, and the fact that
4 they're not proprietary shows all over again that they
5 should have been released in November, that even if
6 they had been proprietary they could have been
7 released in November. So that's one aspect.
8 And the other aspects, as I said before,
9 is punitive, and that has to do with the fact that
10 even though the prejudice is or may be ended at this
11 time, and we'll put aside the fact that the thing's
12 been in operation all this time and we've been subject
13 to the risk and will continue to be subject to the
14 risk as a result of their delaying this case, contrary
15 to the Board's order there should be penalties and
16 that's what sanctions for in addition. So that's what
17 we're asking for.
18 JUDGE FARRAR: When you talk about
19 penalty, are you talking about a monetary -- you know,
20 there's two kinds of money. There's money that pays
21 for your client's attorney's fees that they incurred
22 to have to pursue something that they shouldn't have
23 had to pursue. I'm obviously not making a judgment at
24 this point on whether --
25 MR. SUGARMAN: No, understood.

1 JUDGE FARRAR: -- the Company -- that they
2 should have had to or not, but there's compensatory,
3 and then there's punitive, which says not only do you
4 have to compensate them but here's a penalty to make
5 sure you don't do it again. So there's two kinds of
6 money awards that at least the District courts might
7 be able to do. Good question whether we can.
8 The second issue is limiting the use of
9 the allegedly offending documents or not letting them
10 be used in the merits of the motions. Are you talking
11 about money or are you talking about excluding these
12 documents?
13 MR. SUGARMAN: We're talking about both or
14 either, according to what the Board would decide.
15 JUDGE FARRAR: All right. For purposes of
16 discussing these, do we have to distinguish between
17 the stay motion where the Company did have a chance to
18 file something back before our December conference in
19 response to your second stay motion and the
20 decommissioning bond issue where I think my
21 recollection, and correct me if I'm wrong, my
22 recollection is that we asked the questions about the
23 other irradiator in Pennsylvania, the staff filed
24 something and in fact the Company -- we didn't mention
25 anything about a reply by the Company even though we

1 had it in mind and they got nervous and asked to be
2 sure that they had a chance to reply because they had
3 never been heard on that issue. So to be fair, do we
4 have to separate your argument against them on the
5 stay motion from your argument against -- where they
6 might have had a prior opportunity and the argument on
7 the decommissioning bond and the other irradiator in
8 Pennsylvania where they would claim they did not have
9 a prior opportunity to be heard?
10 MR. SUGARMAN: Well, I'm not -- the answer
11 to that is this: In both cases, you asked or allowed
12 the staff or requested the staff to consider making
13 submissions, and in both cases the issues had been
14 raised in our stay motion, if I recall correctly, and
15 were actually discussed orally at the conference
16 hearing, pre-hearing on December 10.
17 JUDGE FARRAR: No. Let me interrupt. I
18 think in the December pre-hearing conference the staff
19 was not represented, so we deliberately did not talk
20 about the decommissioning bond issue because that's
21 one of the issues that they wanted to participate in.
22 And the question about the other irradiator in
23 Pennsylvania came from us, not from your motion. So
24 I think on that one, unless you -- I mean you're
25 welcome to go back and review the history but I think

1 the Company did not have until it filed Sharon
2 Turner's affidavit on March 12, I think that was, I
3 think that was the first chance they had to file such
4 a document.
5 MR. SUGARMAN: Well, I will have to go
6 back and review because I don't want to depend on my
7 memory on that point, because I do definitely recall
8 being aware that Sharon Turner was involved in
9 Permagrain at the time of the oral argument, and I was
10 of the recollection that that matter had been brought
11 up, her prior involvement with Permagrain. So that's
12 what I'm depending on, but I'm not sure enough of the
13 facts to say that you're wrong or to provide you
14 definitive information. So, yes, I would appreciate
15 the opportunity to go back and check the record on
16 that, on where the Permagrain thing first came up. I
17 remember, now that you say it, that it was taken off
18 the agenda for the verbal conference, the whole
19 decommissioning question, but exactly when Permagrain
20 was raised I can't recall for sure.
21 JUDGE FARRAR: All right. Mr. Pugsley,
22 let me ask you to address this, and let me assure both
23 of you we're going to make no decision on sanctions
24 today until we hear more from both of you because
25 there are serious questions about what is our

1 authority generally in this area, and then if we had
2 authority what would we do with it in the facts of
3 this case? So, Mr. Pugsley, recognizing you'll get
4 another opportunity, do you want to speak briefly to
5 this subject?
6 MR. PUGSLEY: Yes, I would, Your Honor.
7 Basically, for purposes of Mr. Sugarman's statement as
8 to why sanctions are warranted here, first of all, he
9 says that there was an intent to end the briefing on
10 the issues of the Intervenor's renewed stay motion and
11 their discovery request/request for reference to the
12 Commission in November or December, whichever. And
13 let me say first that if you look at the March 5
14 pleadings submitted by CFC, the only areas to where
15 there is a request for denial of the stay motion or
16 the request for discovery or the reference to the
17 Commission is a reiteration of our prayer for relief.
18 The reason that was put in the brief was because we
19 realized as a company that the reason these questions
20 were being asked of NRC staff was to get a grip on the
21 facts for dealing with the Intervenor's stay motion
22 and discovery request.
23 Secondly, in Your Honor's February 17
24 order that set forth the scheduling, a briefing
25 schedule for NRC staff and Intervenors and CFC, it

1 specifically stated at the end of one of the sections,
2 and I apologize I don't have it in front of me, but it
3 specifically stated that -- okay, it's right here.
4 Page 3 of that brief says, "The Intervenors will have
5 a week to file its responses to the staff's brief and
6 any additional company arguments. We are not
7 disputing the fact that we put forth arguments not
8 only supporting the staff but supplementing the
9 staff's position. However, we make it clear -- we
10 would like to make it clear for the record that in no
11 way, shape or form did any of the Company's -- CFC's
12 responses raise additional issues that were entirely
13 outside the scope of the issues raised in your
14 February 17 order.
15 In reference to Mr. Sugarman's claims
16 about the Reviss letters having to be submitted back
17 in November, number one, Mr. Thompson and myself were
18 not in possession of those documents until the day
19 before the pre-hearing conference. Secondly, if you
20 look at Page 356 of the transcript from that
21 conference --
22 JUDGE FARRAR: Wait, let me interrupt you,
23 Mr. Sugarman -- Mr. Pugsley. When you say the Reviss
24 letters, those are the communications between Reviss
25 and the staff?

1 MR. PUGSLEY: Between Reviss and CFC
2 Logistics. The letters that were submitted in the
3 March 5 filing, Your Honor.
4 JUDGE FARRAR: Okay.
5 MR. PUGSLEY: That we released, that we
6 got a waiver of confidentiality on.
7 JUDGE FARRAR: All right.
8 MR. PUGSLEY: Those letters -- we
9 attempted on Page 356 of that transcript Mr. Thompson
10 specifically said, "We are in possession now of
11 letters from Reviss saying that they have no
12 concerns," and as you rightly pointed out during the
13 hearing, that pre-hearing conference was not the
14 appropriate avenue to receive evidence. So the next
15 formal filing after --
16 JUDGE FARRAR: Is that what I said, I wish
17 we'd had those in your filing?
18 MR. PUGSLEY: I believe -- I'm not sure
19 about that, but I do remember you saying that this was
20 not the appropriate venue.
21 JUDGE FARRAR: Okay.
22 MR. PUGSLEY: But the next formal filing
23 after that, because of unexpected incidents that
24 occurred to delay things to the middle of February,
25 the next formal filing for CFC Logistics was on March

1 5, and these letters went directly to the issue of
2 Reviss' alleged concerns. And based on, if you read
3 the transcript, that there was considerable confusion
4 over what exactly these concerns were, CFC deemed it
5 prudent and responsible to submit those letters as
6 evidence. However, those letters do not go outside
7 the scope of any of the issues raised by the presiding
8 officer or discussed by NRC staff. As a matter of
9 fact, they conclusively support NRC staff's position
10 that the plenum in the irradiator and its environment
11 does not cause a health and safety issue. So,
12 basically, CFC was merely doing what the presiding
13 officer appears to have anticipated in our filing,
14 which is agree with the staff and support that
15 argument.
16 JUDGE FARRAR: So you're saying, in
17 effect, that your March 5 filing was really your first
18 opportunity after December 11, given the way the case
19 --
20 MR. PUGSLEY: Well, it was the first
21 formal filing after the pre-hearing conference.
22 JUDGE FARRAR: All right. Let's -- Mr.
23 Lewis, do you want to be heard on this?
24 MR. LEWIS: Well, in a limited sense. It
25 seems to me that the issue that the staff identified

1 and thought about when we saw the responsive pleadings
2 was that there appeared to be some issues regarding
3 relationships between CFC and its contractors. And
4 so, therefore, to that extent, we recognize that there
5 may well have been some proprietary limitations on CFC
6 at that time or some contractual limitations on CFC at
7 that time.
8 Frankly, we were not -- that did not jump
9 out to us as being a problem with respect to the March
10 12 pleading, but that simply may have been a lack of
11 our understanding as to the nature of the particular
12 cost estimates. But we clearly perceived, at least,
13 the presence of such an issue with respect to the
14 March 5. I can only -- and on the point of scope --
15 JUDGE FARRAR: Mr. Lewis, let me interject
16 there. When you say -- do you mean by what you just
17 said that whether or not the Company was right in
18 proprietary claim for the March 5 filing, that in your
19 judgment there was some tolerable basis for them to
20 make such a claim?
21 MR. LEWIS: Yes. Yes, Your Honor. That
22 is exactly what I meant to say. We did not -- we were
23 not being called upon to respond in any pleading, so
24 it was simply a judgment that we made as we saw it.
25 We did not really have enough facts with regard to the

1 March 12 pleading to really form a decision in that
2 regard, although when we first saw it, it did not
3 appear to us that there was an obvious issue of
4 limitation on what the Company could do. But I have
5 to say that we knew we didn't have all the facts with
6 respect to that issue, so that's really about as far
7 as I could go.
8 JUDGE FARRAR: All right.
9 MR. PUGSLEY: Your Honor, may I finish my
10 response to your question?
11 JUDGE FARRAR: Yes, certainly.
12 MR. PUGSLEY: With respect to -- and also
13 this takes into account Mr. Lewis' statement -- with
14 respect to the March 12 filing regarding financial
15 assurance, first off, CFC agrees with the statement
16 that this was the first opportunity to really respond
17 to the Permagrain issue, and, again, all of the
18 substance of that brief was fit squarely within the
19 scope of those questions. Secondly, if you may
20 recall, in the motion for leave to file a response
21 filed by CFC, as you noted earlier, in that statement
22 we specifically noted that we had an employee on staff
23 who was involved in the Permagrain facility and that
24 we would be soliciting that opinion. So had Mr.
25 Sugarman had a problem with us doing that, he should

1 have objected to it then, and then we would have had
2 the discussion. Further, had there been an issue
3 overall here with whether or not CFC was indeed
4 correct under a legal standard of qualifying these
5 documents as proprietary, this could have been first
6 attempted to be resolved by an informal phone call.
7 And then, second, if there was still a dispute, then
8 you simply request the Presiding Officer, Judge
9 Farrar, to decide whether or not they're proprietary.
10 This does not necessarily warrant the imposition of
11 sanctions. And on top of that -- and now, of course,
12 that is moot because all of the documents have been
13 released.
14 So in that situation there's really no
15 need to -- there's really nothing here out of the
16 ordinary, that is there's a dispute over the
17 proprietary nature of documents, that's a dispute to
18 be resolved by either the parties amongst themselves,
19 which we have done now, or by the Presiding Officer on
20 the basis of briefs. So in the vein, really here
21 there's no issue to be dealt with in terms of
22 sanctions, and I can tell you, Your Honor, that CFC is
23 prepared to cite case law where the Commission has
24 addressed the issue of imposing sanctions while on the
25 basis of compensatory costs on a similar issue

1 involving a motion to strike. So we're prepared to do
2 that if necessary, but now that the documents are
3 released and I can say right now on behalf of CFC that
4 we have no objection at all to allowing Mr. Sugarman
5 the amount of time he needs to review these documents
6 with his expert and with whoever else he needs to. We
7 believe that now all the circumstances that allegedly
8 gave rise for sanctions are now gone.
9 JUDGE FARRAR: So you're saying, in
10 effect, he was met with these proprietary documents,
11 we've lost a couple weeks, ten days, two weeks,
12 whatever it is dealing with it, but now he's back in
13 the position he would have been in had you not claimed
14 them proprietary, as long as we give him enough time
15 to file his brief.
16 MR. PUGSLEY: I would agree with that, and
17 CFC would also state that for purposes of the rest of
18 this proceeding, as is now demonstrated by CFC
19 unilaterally pursuing a waiver of confidentiality for
20 these documents, and I can say in response to Mr.
21 Sugarman's claim that the Reviss documents are now --
22 they're really not proprietary, that's not true. We
23 obtained a waiver of confidentiality, so they're still
24 -- we still believe they're proprietary documents but
25 we got a waiver. We believe that they are back in the

1 same position they needed to be, and for the future we
2 recommend that basically if Mr. Sugarman has a problem
3 with a document that we've labeled proprietary, which
4 is the way both parties have conducted themselves in
5 this proceeding thus far, they submit a filing and
6 say, "This is proprietary, this has to be covered
7 under the protective order," if there's a problem, Mr.
8 Sugarman should contact us and attempt to resolve it
9 informally. If we start a dispute, then it's our
10 responsibility or Mr. Sugarman's responsibility to
11 inform you, Your Honor, and tell you that there's a
12 dispute, and then we can answer the question that you
13 posed in your March 16 order saying what is the proper
14 standard for determining something is proprietary.
15 JUDGE FARRAR: Okay. Let me ask you, you
16 talked about case law that you'd looked up. Give me
17 the short answer without any argument whether you
18 think Commission precedent allows us to impose a
19 monetary sanction, either compensatory or punitive?
20 MR. PUGSLEY: Well, Your Honor, just to be
21 clear, it is a factual interpretation as to whether
22 costs can be awarded for preparation of a brief in
23 response to a filing that exceeded a Commission-
24 imposed page limit by six pages. Hydro Resources,
25 Inc. May 25, 2000 and the short cite is CLI-00-08 51

1 NRC 227. Essentially, the Commission said the
2 licensee was not entitled to recover costs for
3 preparation of a motion to strike because while the
4 Commission has never decided whether they could impose
5 compensatory costs, they felt that because the
6 offending brief was replaced with a brief that fit the
7 page limit, sanctions were not warranted.
8 JUDGE FARRAR: So that's not a clear
9 decision on whether the Commission and/or we have
10 authority. It's a decision that in that case it was
11 not justified.
12 MR. PUGSLEY: Correct.
13 JUDGE FARRAR: Okay. That being the case,
14 Mr. Sugarman, there's no need to ask for any
15 authority. Let me propose a way of all of us moving
16 forward and I'll let you comment on this. As we
17 indicated, we would give Mr. Sugarman until -- with
18 the help of Dr. Resnikoff until Friday, April 2 to
19 file replies on both the stay motion and its related
20 relief and the decommissioning bond issue. Mr.
21 Pugsley, I believe you've heard from Judge Abramson --
22 MR. PUGSLEY: Yes, sir.
23 JUDGE FARRAR: -- today. Mr. Sugarman
24 he's been trying to reach you. Was he successful?
25 MR. SUGARMAN: No. I tried to reach him

1 this morning and was unsuccessful and left a message
2 for him because I had to leave for court.
3 JUDGE FARRAR: Okay. Let me tell you what
4 his plans are. He was previously scheduled to be out
5 of the office all next week, so his plan is to meet
6 with both of you separately, which a settlement judge
7 is entitled to do, the week of Monday, April 5. Then
8 what I would propose is this: Mr. Sugarman files his
9 briefs on the 2nd. That will put us, Judge Kelber and
10 me, in position to be writing our decision on the
11 pending motions and to finalize our order that we will
12 send you after we rule on the pending motions, the
13 order calling for your presentations on the merits,
14 defining those issues as we defined them at the pre-
15 hearing and asking our own questions.
16 I think that whether the parties will
17 reach settlement or not would be a fairly brief
18 discussion with the two sides separately, perhaps with
19 the two sides together depending on what Judge
20 Abramson decides to do, so I think in the natural
21 order of things, we would not have our decision on the
22 pending motions done before Judge Abramson concludes
23 his discussions with you and you either reach
24 settlement, and I've previously expressed my thoughts
25 on how I think a settlement might be shaped, but that

1 will now be in Judge Abramson's hands. If you decide
2 there will be no settlement, then we would have our
3 decisions underway and could issue them shortly after
4 we hear from Judge Abramson that there is no
5 settlement.
6 I propose that we wait until then to
7 decide on the sanctions question, that if that point,
8 Mr. Sugarman, you still want to press for sanctions,
9 we would ask you to file a brief discussing in some
10 detail our authority to award various sanctions and to
11 why that authority is justified in all the
12 circumstances here. But let me modify that. On the
13 stay motion, if you want to put in your April 2 brief
14 why we should not -- that you believe we should, never
15 mind the monetary penalty because that could be dealt
16 with later, but that you believe we should not use CFC
17 Logistics material --
18 MR. SUGARMAN: Right.
19 JUDGE FARRAR: -- on the stay motion, that
20 would be a sanction, of course, you'd want to have in
21 place before we resolve the stay motion. So let's
22 forget the monetary penalties for now, we can deal
23 with that later, but let's -- if you want to pursue
24 the exclusion of their March 5 documents, then you put
25 that in your April 2 brief. If in fact Mr. Sugarman

1 puts that in his brief, Mr. Pugsley, we would then
2 give you an opportunity to reply --
3 MR. PUGSLEY: Okay.
4 JUDGE FARRAR: -- on that question, but
5 let's defer the monetary issue --
6 MR. PUGSLEY: Judge Farrar, for purposes
7 of your schedule, I should just inform you that I've
8 spoken to Judge Abramson and we are scheduled to meet
9 with him on the 6th in the morning.
10 JUDGE FARRAR: Okay. All right. And I
11 think what he said to me was he anxious, Mr. Sugarman,
12 to meet with you that same week.
13 MR. SUGARMAN: Does your staff have his
14 phone number. I'm still out of town in court, so I
15 don't have his phone number handy. I'll give him a
16 call when we hang up if your staff has his number
17 handy.
18 JUDGE FARRAR: We'll get that for you.
19 MR. SUGARMAN: Okay.
20 JUDGE FARRAR: It's 301-415 something.
21 (Laughter.)
22 MR. SUGARMAN: Well, that can only be one
23 of 10,000, so that's a pretty good start.
24 JUDGE FARRAR: Start dialing. You'll get
25 him eventually.

1 MR. SUGARMAN: If I get the right spam
2 program, I can probably get him in the next ten
3 minutes.
4 JUDGE FARRAR: So let's deal with the
5 sanction. On the --
6 MR. PUGSLEY: Mr. Sugarman, the number is
7 415-0252.
8 MR. SUGARMAN: Oh, thank you.
9 MR. PUGSLEY: You're welcome.
10 JUDGE FARRAR: Thank you, Mr. Pugsley.
11 MR. PUGSLEY: No problem.
12 JUDGE FARRAR: On the sanction, on the
13 financial, while I usually let parties have their say
14 before we rule, my recollection is strong enough that
15 the March 12 -- that this was a Board-triggered
16 inquiry and that the March 12 filing was the Company's
17 first real chance to present the material on the other
18 irradiator. So, Mr. Sugarman, I can't preclude you
19 from asking for the exclusion of that, but I think
20 that would be a vein effort.
21 MR. SUGARMAN: Well, we'll analyze that
22 and taking into account everything that's been said
23 here, which obviously goes back over a lot of history,
24 tangled history, so we'll take a moderate approach to
25 it and see what we have to say.

1 JUDGE FARRAR: All right.

2 MR. SUGARMAN: We may drop it on that

3 aspect.

4 JUDGE FARRAR: All right. So that will be

5 your choice on the April 2. And, Mr. Pugsley, you

6 will not get a chance to reply to the April 2 briefs

7 on their substance, but you will get a chance if the

8 question of sanctions is pursued on either one.

9 MR. PUGSLEY: Judge Farrar, may I ask a

10 question?

11 JUDGE FARRAR: Yes.

12 MR. PUGSLEY: With respect to your point

13 about delaying the decision on the stay motion, et

14 cetera, until determination is made as to whether or

15 not settlement can be reached, may I ask if the

16 settlement -- if proceedings on settlement continue

17 through the middle of April, is it possible for a

18 decision to be rendered on those issues then, because,

19 as you well know, a lot of settlement is based on risk

20 of winning or losing and decisions on those motions

21 might change various parties' perspective. So is it

22 worthwhile to issue those decisions anyway despite the

23 ongoing nature of settlement discussions?

24 JUDGE FARRAR: Let me put it this way: It

25 will take us -- we'll turn to it as soon as we get the

1 documents on April 2.

2 MR. PUGSLEY: Okay.

3 JUDGE FARRAR: It would seem to me that it

4 would -- we had talked in an earlier order about mid-

5 April trying to get these decisions out, but I think

6 we put in there absent any lengthy briefing

7 extensions. This is not so much an extension as a

8 hitch or glitch in the proceedings. I would think

9 that starting after April 2 we're not going to finish

10 by mid-April, so I would encourage you to work

11 diligently with Judge Abramson on the settlement

12 discussions.

13 And we will -- Judge Kelber and I will not

14 assume that the settlement discussions will be

15 successful, so we will be at work diligently writing

16 the decisions, and the day we hear that there's either

17 settlement -- if we hear there's settlement, we'll

18 stop working; if we hear there's no settlement, we'll

19 continue working and put them out as soon as we can

20 thereafter, because until we put those out we can't

21 call for your presentations on the merits. So I

22 understand what you're saying, Mr. Pugsley, but I --

23 MR. PUGSLEY: I mean the information you

24 just gave me answers my question.

25 JUDGE FARRAR: Right.

1 MR. PUGSLEY: But I figured that since it
2 was slightly delayed, that makes perfect sense. Thank
3 you very much.
4 JUDGE FARRAR: Okay. You're welcome. As
5 we look forward, the Private Fuel Storage proceeding
6 since we last spoke has moved off into the distance.
7 We are going to have a conference call with the
8 parties on Tuesday to set that schedule. That hearing
9 could be -- I suppose it's still conceivable it's July
10 or August, but it also could be August or September
11 depending on what the parties agree and how many
12 witnesses they can stipulate away and so forth and how
13 long discovery takes, how much they can do in advance.
14 Last time we spoke about your presentations on the
15 merits each side was asking for about six weeks. Is
16 that still the case?
17 MR. SUGARMAN: Yes.
18 MR. PUGSLEY: Yes, Your Honor.
19 JUDGE FARRAR: Okay. Then what we will do
20 is then you're probably looking at, Mr. Sugarman,
21 maybe May through mid-June for yours, and, Mr.
22 Pugsley, you'd be doing June and July -- late June and
23 all of July.
24 MR. PUGSLEY: All right.
25 JUDGE FARRAR: That's assuming that there

1 were no settlement and that we got our two decisions
2 out by the end of April along with our charge to you
3 on what we needed answered on the merits. So for
4 planning purposes, you can consider that.
5 MR. LEWIS: Your Honor, this is Steve
6 Lewis.
7 JUDGE FARRAR: Yes.
8 MR. LEWIS: The breadth of what the staff
9 would be involved in would of course depend upon your
10 ruling -- in part, upon your ruling on the
11 decommissioning financial assurance issue, and then
12 the other issue on which we are participating is the
13 physical security, otherwise known as safeguards
14 issues, so would you be envisioning that the staff
15 would be responding -- not responding but making its
16 written presentation in the same time frame as the
17 Licensee?
18 JUDGE FARRAR: Good question, Mr. Lewis.
19 Thank you for reminding me about the security. You're
20 right, the decommissioning bond issue could go away on
21 a legal ruling. If it does not, then we would ask you
22 to file at the same time the Company. In other words,
23 we're going to have three sets of issues. Let's call
24 them the basic merits, the decommissioning bond issue
25 if it is not decided on a legal ruling. That would

1 involve a staff response. And then the security
2 planning, which would have to be done under some sort
3 of security or safeguards protection, and we have not
4 yet discussed -- that, of course, the staff would be
5 involved in, but we've not yet discussed the handling
6 of that. Is that a matter -- Mr. Lewis, perhaps you
7 could do this -- are the Intervenors, Mr. Sugarman and
8 Dr. Kelber are they fully informed about the security
9 plans? I was not sure back in our first session in
10 Pennsylvania that they had all the facts about what
11 those plans involved.
12 MR. SUGARMAN: Well, I can answer that.
13 The answer is, no, we do not have all the facts. We
14 have almost no facts.
15 MR. LEWIS: This is Steve Lewis. It's my
16 recollection that the documents that -- the pages of
17 the application that had anything in the nature of
18 physical security were in fact provided under the
19 protective order. Maybe Mr. Pugsley remembers
20 something in that regard, but I believe that they had
21 an element of safeguards, but they also had an element
22 of proprietary associated with them. But it's my
23 recollection that those pages have been provided.
24 MR. SUGARMAN: There were a couple of
25 pages provided, but there's nothing in them. It's a

1 reference to other material.

2 MR. LEWIS: All right. Well, let me see

3 if -- I'm just asking -- I'm telling you what my

4 recollection of the particular point is about what's

5 in the application.

6 MR. SUGARMAN: Right. And my recollection

7 is that the application has no detail in it

8 whatsoever. It just has a reference to another

9 document, if I remember correctly. Maybe Dr.

10 Resnikoff has more recollection than I do.

11 DR. RESNIKOFF: I agree.

12 JUDGE FARRAR: We didn't hear you, Dr.

13 Resnikoff.

14 DR. RESNIKOFF: I agree.

15 JUDGE FARRAR: Okay. Let me suggest this

16 then: Maybe the way to get moving on this, Mr. Lewis,

17 would be toss this ball to you since Mr. Sugarman and

18 Dr. Resnikoff will be occupied between now and April

19 2. How about you use that time to -- let's start from

20 scratch on the security issue. The contention has

21 been let in, but why don't you do your best to

22 assemble a package of materials that Mr. Sugarman and

23 Dr. Resnikoff would need to look at. You can get them

24 those materials after the 2nd, and then during that

25 period where settlement discussions are going on, we

1 could have another pre-hearing conference where we
2 would talk to the three parties about how to proceed
3 on the security contention now that the Intervenors
4 would be fully informed.
5 MR. LEWIS: Well, I understand what Your
6 Honor is asking us to do, the staff to do. It could
7 be a little bit more problematic than you have
8 indicated in that if upon assembling the material it
9 turns out that in fact there are documents that have
10 not been provided yet to Mr. Sugarman and to Dr.
11 Resnikoff because they are safeguards information,
12 then we would have to work out with Mr. Sugarman a
13 safeguards protection agreement, which is above and
14 beyond anything that's been addressed in the
15 protective order so far. I'm sure you've seen them,
16 Your Honor, and they get into very specific matters
17 about the handling of safeguards information.
18 JUDGE FARRAR: Right, but the leading
19 experts in the world on that are somewhere in the
20 staff because they've --
21 MR. LEWIS: Oh, we can address that. I'm
22 just simply saying that I wanted Your Honor and Dr.
23 Resnikoff and Mr. Sugarman to understand that if I'm
24 understanding you correctly, I wouldn't be able to
25 achieve that totally unless I also had the opportunity

1 to discuss with Mr. Sugarman his willingness, and I
2 think Mr. Pugsley also, the willingness to enter into
3 a safeguards protective agreement, which is a
4 considerably different matter than the protective
5 agreement that exists.
6 JUDGE FARRAR: Right. We're operating
7 under such an agreement in the Private Fuel Storage
8 case, and I think this is one, given Mr. Pugsley's
9 suggestion of a few minutes ago about how when there's
10 a problem with documents don't get us involved, you
11 all work it out.
12 MR. LEWIS: Okay.
13 JUDGE FARRAR: And this is something that
14 the staff we deferred. On proprietary, we have the
15 last word. On safeguards, I think the view has been
16 that the staff has the last -- for right or wrong,
17 they are the ones who are charged with the very
18 important responsibility of protecting safeguards
19 material, so everyone has taken the view in the
20 Private Fuel Storage case that if the staff says it's
21 safeguards, it's safeguards if the Board doesn't
22 second guess them. But having said that, Mr. Sugarman
23 and Dr. Resnikoff are entitled to see it in order to
24 present their contention, but they can't see it
25 without signing the standard safeguards agreement.

1 MR. SUGARMAN: Well, I would think it
2 would be -- this is Bob Sugarman -- I think it would
3 be a very good idea for Mr. Lewis to let us know the
4 requirements for a safeguard agreement ASAP if
5 presumably it's something that is not difficult to do.
6 There must be some form or something that the staff
7 has worked out or some set of regulations. And
8 whether that itself is confidential, I don't know.
9 MR. LEWIS: No, it isn't.
10 MR. SUGARMAN: So if you can direct us to
11 it or --
12 MR. LEWIS: Sure.
13 MR. SUGARMAN: -- better,
14 furnish us a copy of it after this call is over, we
15 can deal with it.
16 MR. PUGSLEY: Your Honor, may I pose a
17 question to Mr. Lewis?
18 JUDGE FARRAR: Yes.
19 MR. PUGSLEY: Steve, isn't it true that
20 the only issues, only documents related to security
21 that have been disputed since the license application
22 was disclosed and the protective order had been agreed
23 upon was the, quote, unquote, "irradiator orders,"
24 that came directly from the Commission? And I
25 remember that that issue was briefed, that it was NRC

1 staff's position that challenges to the sufficiency of
2 irradiator orders had to be done at the Commission
3 level.
4 MR. LEWIS: That's correct. I interpreted
5 the Presiding Officer's question as having
6 acknowledged -- well, I'm going too far. Your Honor,
7 I did not understand your question to be with respect
8 to the orders issued to irradiators, the so-called
9 compensatory measures orders. I mean we have fully
10 briefed that, and I would assume that that is going to
11 be one of the rulings that you're going to make in the
12 order you're working on, because it relates to what is
13 or is not permitted to be litigated regarding security
14 in this proceeding.
15 JUDGE FARRAR: Mr. Lewis, I have not --
16 it's been some time since I've focused on the security
17 contention. Are you saying that when the Commission
18 issued all these orders those were coupled with the
19 information that those are challengeable only at the
20 Commission level?
21 MR. LEWIS: Well, they're challengeable
22 only by a challenge to the order.
23 JUDGE FARRAR: Right. But how about if
24 the Intervenors want to argue that, yes, the
25 Commission issued these orders but the Company is not

1 complying with them?

2 MR. LEWIS: Now that is not within the

3 ambit of the question of whether or not this facility

4 was properly licensed.

5 JUDGE FARRAR: Wait, wait. Hold on, it's

6 coming back to me. That's that question that those

7 orders are outside the licensing proceeding. Now,

8 suppose the Commission security orders had been issued

9 a long time ago, three or four years ago, before CFC

10 Logistics ever gotten in this business and they file

11 an application and they say, "Here's how we're going

12 to comply with the Commission orders," and the

13 Intervenors say, "Well, but you're not -- the way you

14 say you're going to comply falls short." Ordinarily,

15 that would be something they could file a contention

16 with us on.

17 MR. LEWIS: No, they could not. The

18 Commission has proceeded and specifically so stated by

19 way of orders. It has not to this point in time

20 amended its regulations. It has also indicated that

21 it is planning to amend its regulations, but it has

22 not yet done so. Accordingly, and the Commission has

23 addressed this, the orders exist outside of the

24 regulations. The regulations establish the standards

25 that CFC Logistics is required to meet, the

1 regulations in Part 36 have some provisions regarding
2 physical security. Those are -- and this is -- I'm
3 not just freelancing here, these are the arguments we
4 have already made in briefs. Those are the standards
5 to be met in terms of licensing. The orders exist as
6 additional requirements but they did not establish a
7 new licensing basis. Are you --
8 JUDGE FARRAR: Okay. I'm following you,
9 but let me ask the question: Suppose Mr. Sugarman --
10 can Mr. Sugarman see those orders?
11 MR. LEWIS: Can he see the orders? I
12 would take the position that he does not have a need
13 to know.
14 JUDGE FARRAR: Well, okay. The only way
15 you can say that is he does not have a need to know
16 because if he knew -- suppose he did see the orders
17 and he knew for a fact from some insider in the
18 Company that the Company was not complying with them.
19 What is his -- what would he do if he knew for a fact
20 that the Company was not complying with the
21 Commission's security orders? Where would he go with
22 that? You're going to say not to us.
23 MR. LEWIS: Well, I have to go back to
24 basic principles here. The orders were issued. The
25 Federal Register -- the non-proprietary portion of the

1 order was put into the Federal Register in each and
2 every case in each of these groups of licensees that
3 were addressed. And there was a provision for members
4 of the public to oppose the issuance of the order if
5 they so chose. The --
6 JUDGE FARRAR: But let's say he's not
7 challenging the order the Commission issued. In other
8 words, everyone says, okay, the Commission knows about
9 this, they put out an order, it says, "Licensee,
10 here's what thou shalt do." So he's not challenging
11 what the Commission did, that stands, but he knows
12 from somebody that the Licensee is in fact not doing
13 that, not doing what the Commission told them to do.
14 Where does he go with that?
15 MR. LEWIS: He goes to the Executive
16 Director of Operations under 10 CFR 2.206.
17 JUDGE FARRAR: All right. Well, then if
18 -- oh, that's right. Are you arguing then that the
19 security contention has no place in front of us and
20 ought to be dismissed?
21 MR. LEWIS: No, I'm not arguing that. I'm
22 arguing that the security standards are those that
23 exist in Part 36.
24 JUDGE FARRAR: And so Mr. Sugarman can
25 challenge those. He can challenge the Company's

1 compliance with those.

2 MR. LEWIS: Yes, right, as he can the

3 Company's compliance with any other regulations.

4 JUDGE FARRAR: Okay. What does he need to

5 have in his hands to -- what documents does he need to

6 have in his hands to challenge that?

7 MR. LEWIS: Okay. And that is precisely

8 now I think what you are asking me to pull together in

9 this same time frame as the Intervenors are responding

10 to CFC on both of the pending matters.

11 JUDGE FARRAR: All right. Then as you

12 carry that out, why don't -- how would it be if you

13 were to pull those documents together and also write

14 a little two- or three-page cover memo explaining to

15 the parties and to Dr. Kelber and me exactly how all

16 this fits together?

17 MR. LEWIS: Okay.

18 JUDGE FARRAR: Doesn't have to be

19 argumentative, just here's how all these pieces

20 dovetail together, how the jigsaw puzzle is put

21 together, and here's how, as you see it, how Mr.

22 Sugarman can proceed in front of us and how he can

23 proceed in front of the Executive Director for

24 Operations.

25 MR. LEWIS: Yes, sir.

1 JUDGE FARRAR: Mr. Sugarman may or may not
2 agree with it, and he can proceed accordingly, but at
3 least that would lay out what the staff -- how the
4 staff thinks the system works. I think that would
5 benefit all of us. Can you do that, Mr. Lewis?
6 MR. LEWIS: Yes. Your Honor, let me just
7 make sure I understand. Your intention would be that
8 we would file that on the same date that the
9 Intervenors are filing their responses?
10 JUDGE FARRAR: That would be helpful. If
11 for some reason or because of safeguards problems you
12 run into difficulty, let us know, but have the
13 safeguards part of it worked out so that those are
14 documents Mr. Sugarman could put his hands on and so
15 forth.
16 MR. LEWIS: Okay. Well, we will proceed
17 with all due speed to try to meet that date and to
18 also be able to present to you that we've reached
19 agreement with the Intervenors on their receipt of
20 that information.
21 JUDGE FARRAR: Excellent. Mr. Sugarman,
22 any objection to proceeding in that fashion?
23 MR. SUGARMAN: No, I have no objection to
24 that. I'm requesting on the record copies of the
25 orders that are relevant to this type of facility. To

1 reiterate that we've been requesting that for a long
2 time, but in case I didn't use those words lately I
3 would say it again. And I understand we're moving
4 towards at least getting resolution and hopefully
5 getting a look at those orders for whatever purpose we
6 might try to do something about it because I don't
7 know until I see the orders. So whether I have any
8 interest in questioning their adequacy and if so how
9 I would go about doing that, but that's all
10 hypothetical.
11 JUDGE FARRAR: Mr. Lewis, in that cover
12 memo you're going to do, if you believe Mr. Sugarman
13 cannot see those orders, please put that in the cover
14 memo with a short statement of reasons.
15 MR. LEWIS: Yes.
16 MR. SUGARMAN: Your Honor, may I say
17 something at this point?
18 JUDGE FARRAR: Certainly.
19 MR. SUGARMAN: This whole discussion has
20 highlighted in my mind the fact that CFC continues to
21 selectively release information, whether it be an
22 affidavit of Ms. Turner or whether it be letters from
23 Reviss, which in every case are the ones that they
24 think support their position. We're now into the area
25 where we're having what I would call undiscovery where

1 the Company is allowed to use documents that are
2 excerpts -- or not excerpts, that's the wrong word --
3 that are segments of the record while withholding the
4 other segments of the record. And as a sanction for
5 their conduct with respect to the Reviss letters, I
6 would request that the Board order them to produce the
7 remainder of the documents or to have the ones that
8 they produced and the arguments related thereto
9 struck. It seems to me that that's a sanction that
10 should be requested now, and maybe the Commission --
11 the Board could entertain a response to that before
12 April 2, because it would be most efficient if the
13 Board were to rule in our favor on that that we would
14 have the documents in time to utilize them in
15 preparing our April 2 response.
16 By way of illustration, I'm referring to
17 the correspondence or memoranda that Reviss might have
18 written when it was pursuing its concern. And, by the
19 way, I don't agree with Mr. Pugsley, and we'll point
20 this out on April 2, that Reviss in any way withdrew
21 its concerns in that correspondence that he did
22 produce. But I'm guessing, hoping that there would be
23 some documentation of their initial concern that has
24 not been produced. And instead what we've been
25 treated to is Mr. Stein's description of his trip on

1 the road and self-serving information only. And so
2 we're not in a situation where there's been no
3 discovery, we're in a situation where there's been
4 undiscovery or segmentation, and that seems to me that
5 would be an appropriate sanction. That's one point.
6 The other point I want to make is that
7 we've been asking for the heat calculations for a long
8 time over and over again. I'll let Dr. Reviss (sic)
9 speak to it in a minute. But the most recent response
10 was to refer us to a portion of the record. Dr.
11 Reviss (sic) has been there before, he's been there
12 again. It doesn't document the issue that Dr. Kelber
13 was raising again to us in Quakertown and we've raised
14 in the papers as to whether there was actually a heat
15 impact calculation associated with this particular
16 type of installation as opposed to heat calculations
17 of other types of installations in other places, and
18 we're still asking for that documentation. I'm coming
19 to the belief it's never been done in this case, but
20 our question is if the staff has done it or has seen
21 it and if CFC has done it, where is it? And I'll ask
22 Dr. Resnikoff at this point to tell you why the
23 information that we were referred to is not the
24 information we're seeking.
25 JUDGE FARRAR: Go ahead, Dr. Resnikoff.

1 DR. RESNIKOFF: Well, we did go to the
2 section that the staff pointed out, this February, I
3 believe, transmittal, and it does have heat
4 calculations, but the heat calculations do not
5 directly pertain to, in our opinion, to the situation
6 at CFC Logistics. And so that's why Mr. Sugarman is
7 raising this issue as to why we haven't seen it. We
8 haven't seen the calculations that are pertinent to
9 this application.
10 JUDGE FARRAR: Mr. Pugsley, can you --
11 let's go in reverse order here. Why don't you respond
12 to this latest and then I'll let you respond to Mr.
13 Sugarman's other concern.
14 MR. PUGSLEY: All right, Your Honor.
15 There's several points in trying to address each thing
16 Mr. Sugarman has raised. Number one, with respect to
17 the heat calculations, as CFC stated in its brief
18 regarding I believe it was March 5, that the staff
19 stated that in response to a request for additional
20 information CFC provided heat calculations, and that
21 was made part of the license application put in the
22 record. We believe -- we agree with the staff, they
23 have been provided and were sufficient to license the
24 facility.
25 MR. SUGARMAN: So he's saying that they're

1 pertinent.

2 JUDGE FARRAR: Wait a minute. So whatever

3 you provided the staff should be available to Mr.

4 Sugarman. You're saying it has been made available.

5 MR. PUGSLEY: To the best of my knowledge,

6 that's correct, am I right? But it's deemed

7 pertinent.

8 JUDGE FARRAR: Well, wait.

9 MR. SUGARMAN: But the issue is that they

10 gave something that wasn't pertinent.

11 JUDGE FARRAR: Well, then that would be a

12 basis for you to challenge the validity of their

13 license on the --

14 MR. SUGARMAN: We are, but the point is

15 that they never said that that's all they produced,

16 and they've never said that's all they have. All they

17 said is that's all we can have.

18 JUDGE FARRAR: No, no. I know. I thought

19 they said that's all they gave the staff.

20 MR. PUGSLEY: No. Your Honor, what CFC is

21 saying is that the information -- we agree with the

22 staff's statement in their February 27 brief that says

23 heat calculations were -- source temperature

24 calculations based upon an assumed full license

25 capacity of a million curries were provided in an

1 April 18, 2003 response to a staff RAI, and it
2 contains X, Y and Z, and it says in the brief. And it
3 says the staff reviewed the material and found it
4 acceptable for licensing. We agree with that.
5 JUDGE FARRAR: Now, Mr. --
6 MR. SUGARMAN: That's irrelevant.
7 JUDGE FARRAR: Wait, wait, wait.
8 MR. PUGSLEY: Well, Mr. Sugarman, I'm
9 responding to a direct question, and if I can finish
10 my response to your point, Mr. Sugarman.
11 MR. SUGARMAN: Can we stay on that for a
12 minute?
13 JUDGE FARRAR: No. Let me follow up here.
14 Mr. Pugsley, were any other calculations submitted to
15 the staff -- let me tell you how I understand the
16 rules of discovery and, as Mr. Sugarman says, of
17 undiscovery here. Anything that the Company submitted
18 to the staff should be available to Mr. Sugarman and
19 his clients. Anything the Company has in its files
20 that it didn't submit to the staff if Mr. Sugarman
21 wants that, he somehow has to get around the plain
22 language of the anti-discovery rule.
23 MR. SUGARMAN: That's why we're asking for
24 a referral on that.
25 JUDGE FARRAR: Right. I understand that.

1 MR. PUGSLEY: If I may be able to answer
2 the question, the answer is, yes, whatever is
3 submitted to the staff that they used for a licensing
4 decision is automatically made part of the hearing
5 file. Anything that is not submitted to the staff if
6 Mr. Sugarman wants it, it's discovery.
7 MR. SUGARMAN: There's a third category.
8 There's a third category. One category you just
9 identified as anything that was submitted to the staff
10 that was used for the licensing decision. The other
11 category is anything that wasn't submitted to the
12 staff. But there's a third category. That's
13 information that was submitted to the staff that
14 wasn't used for the licensing decision.
15 MR. LEWIS: I don't know what you're
16 talking about, Mr. Sugarman.
17 MR. SUGARMAN: I'm talking about heat
18 calculations -- I'm talking about heat calculations
19 that are pertinent to this facility.
20 MR. LEWIS: I understand your words, I
21 totally fail to understand your concept. The
22 regulations require that the hearing file in a
23 proceeding contain the application and all of the
24 written communications between the licensee and the
25 staff.

1 JUDGE FARRAR: So, Mr. Lewis --

2 MR. LEWIS: And so I would indicate to you

3 that to the best of our knowledge and belief those

4 exchanges are all in the hearing file.

5 JUDGE FARRAR: So, Mr. Lewis, from what

6 you just said, everything the staff got from the

7 Company is in the -- good, bad or indifferent, is in

8 the hearing file.

9 MR. LEWIS: Exactly. And I just don't

10 understand the interpretation that Mr. Sugarman had of

11 what we provided regarding when we directed Mr.

12 Sugarman and Dr. Resnikoff to the heat calculation

13 information that was submitted.

14 MR. SUGARMAN: Okay. Well, we're real

15 paranoid because we're only looking at what we're

16 given, and we're told we can't have anything that

17 somebody doesn't want to give us.

18 JUDGE FARRAR: Well, no, no. Wait, wait,

19 Mr. Sugarman.

20 MR. SUGARMAN: I understand the concept

21 now that everything that goes to the Commission gets

22 into the file, whether or not -- now I understand

23 whether or not the Commission uses it. And so I'm

24 satisfied Mr. Lewis made a representation. That's the

25 representation that we go forward with on the record.

1 So that eliminates that third category that I was
2 hearing him talk about a minute ago. That was just a
3 matter of conversation, so we're past that.
4 And I guess my point then is having
5 clarified that there are no heat calculations in the
6 staff -- that the staff ever received that relate to
7 this facility. I understand staff calculations that
8 relate to other facilities were submitted and
9 considered but nothing relating to this particular
10 configuration. And now that we know that, I would
11 again say that's another reason why we should have
12 discovery is to find out if the Company ever did any
13 heat calculations on a facility of this particular
14 configuration.
15 JUDGE FARRAR: All right. Then I think
16 what you need to do as part of your reply is
17 demonstrate that what you found in the hearing file
18 is, in your judgment, inadequate either to support a
19 license or for the staff to have granted a license --
20 MR. SUGARMAN: Right.
21 JUDGE FARRAR: -- and that there must be
22 something else that the Company has and that that's
23 why you'd like us --
24 MR. SUGARMAN: Right. Well, must be
25 something anyway.

1 JUDGE FARRAR: Well, but --

2 MR. SUGARMAN: They shouldn't be doing

3 something like this without doing an actual heat

4 calculation.

5 JUDGE FARRAR: The point is if you don't

6 succeed in that, in other words, if you don't succeed

7 in convincing us that what the Applicant submitted and

8 the staff ruled on was adequate, then we don't have to

9 go further. If what they have is adequate, the fact

10 that there might be something --

11 MR. SUGARMAN: Okay. And not to pursue

12 this too long but the problem is that until you see

13 the actual heat calculations on a facility of this

14 type, you don't know whether it was adequate.

15 JUDGE FARRAR: Well, no, no. Dr.

16 Resnikoff, the burden will be on him --

17 MR. SUGARMAN: I understand.

18 JUDGE FARRAR: -- to tell us that this was

19 not adequate and that that would be a reason for us to

20 refer to the Commission, let's dig around a little

21 more here.

22 MR. SUGARMAN: Right. Understood.

23 JUDGE FARRAR: Okay.

24 MR. SUGARMAN: Now, my other point we

25 caught Mr. Pugsley often responding to and that is to

1 produce the whole Reviss file and all other
2 documentation relating to the safety of the valves so
3 as to flush out the selection production that they did
4 make.
5 JUDGE FARRAR: And I guess there we have
6 -- I know, for example, in a criminal proceeding the
7 prosecutor has to turn over all the information --
8 MR. SUGARMAN: Well, I'm not going that
9 broad. I'm just saying that where they make a
10 representation and select some documents and do it in
11 an inappropriate way, go back to my sanctions motion,
12 that as a sanction and as a matter of judicial
13 proceeding, the Board should at a minimum, and this is
14 not by way of cutting down on my sanctions request,
15 but at a minimum the Board should say, "Give us the
16 rest of the pile. You've given us what benefits you
17 and done it out of time and beyond the scope of what
18 you were allowed to do. Now, if you want it to be
19 considered, give us -- and the argument associated
20 with it, then give up the rest of the information that
21 isn't as favorable.
22 JUDGE FARRAR: Let's start small on this,
23 Mr. Sugarman. Mr. Pugsley, let me ask you this:
24 Suppose a question came up and you submitted a
25 paragraph out of a letter, and we said to you, "That's

1 an interesting paragraph, but, you know, it seems you
2 ought to show us the whole letter so we can see the
3 context of that paragraph, the context against which
4 the paragraph was presented." Would you claim that
5 was an impermissible discovery request?
6 MR. PUGSLEY: Well, I would say that that
7 -- that if he requested the entire letter -- I'm not
8 sure what I would say, Your Honor.
9 JUDGE FARRAR: Okay.
10 MR. PUGSLEY: It's something I would have
11 to think about.
12 JUDGE FARRAR: Okay.
13 MR. PUGSLEY: But I can tell you that I
14 understand your hypothetical and I understand where
15 you're going with this, but I can honestly say that
16 that is not the situation we're dealing with here.
17 JUDGE FARRAR: Whenever you --
18 MR. PUGSLEY: And it is my experience, and
19 Mr. Thompson's, I can speak for him as well, it is his
20 experience as well that submitting supporting
21 documentation such as the Reviss letters is common
22 practice. It's done all the time.
23 JUDGE FARRAR: Okay. But when you
24 submitted those, you submitted the entire letter.
25 MR. PUGSLEY: Yes, every time.

1 JUDGE FARRAR: Right. So that gets us
2 past my first hypothetical, which is what if you only
3 submitted a paragraph. Now, Mr. Sugarman is saying,
4 okay, you submitted certain letters, but how do we
5 know there aren't other letters that cut against you?
6 And I guess that runs into the -- in ordinary
7 litigation, he'd be able to force you to produce
8 those.
9 MR. PUGSLEY: As a discovery mechanism.
10 JUDGE FARRAR: Right. And, Mr. Sugarman,
11 the rule is so clear I think you're right in asking us
12 --
13 MR. SUGARMAN: But I'm not asking for it
14 at this point as discovery. That I'm doing in my
15 previous submission. I'm asking for it as a sanction
16 for them taking it upon themselves to unilaterally
17 exceed the scope of what the Commission allowed and
18 start making new arguments with new documents after
19 the briefing was essentially closed except for a
20 limited response.
21 JUDGE FARRAR: Okay. But that's what you
22 have to put in your April 2 --
23 MR. SUGARMAN: Well, I was -- okay. All
24 right.
25 JUDGE FARRAR: That has to be presented

1 cogently and clearly in your April 2 document, and if
2 it is, then Mr. Pugsley will have a chance to respond.
3 MR. SUGARMAN: I was only hoping we could
4 get a jump on it now so that we could have the results
5 of it reflected in our April 2 document, but I
6 understand what you're saying.
7 JUDGE FARRAR: Yes. The rule is -- I
8 understand the theory by which you're trying to work
9 within the confines of the rule, but the rule is so
10 clear that --
11 MR. SUGARMAN: It's a narrow situation.
12 I'm asking for it by way of a sanction in this
13 instance.
14 JUDGE FARRAR: Well, I think we'd better
15 stick to our original --
16 MR. SUGARMAN: All right.
17 JUDGE FARRAR: -- plan that you have to
18 ask for that. Now, you're right, if you win on that
19 sanction and you get some other material, then you'll
20 have another chance to pursue your argument on the
21 merits of that motion --
22 MR. SUGARMAN: Right.
23 JUDGE FARRAR: -- if you get some material
24 later. All right. I think then we know where we're
25 headed, at least in the proceeding in front of Dr.

1 Kelber and me. I would urge you, as I have on several
2 occasions, to look for whether there's a path to
3 settlement that serves the needs of the citizens to be
4 assured that this is not -- this facility in its
5 present condition or a modified condition is not a
6 threat to them and whether there isn't some way to
7 accommodate that. Otherwise if there's no settlement,
8 we will proceed as planned, make rulings on the
9 motions, make rulings on any sanctions that are asked
10 for and turn to the merits. So is there any other
11 business we should conduct?
12 MR. PUGSLEY: Yes, Your Honor. This is
13 Chris Pugsley. One question. For purposes of
14 briefing schedule, does the Board plan on issuing an
15 order sometime in April, a listing or detailing,
16 whichever, the areas of concern appropriate for
17 litigation here seeing as how the decommissioning bond
18 issue, as you said earlier, might go out on a legal
19 ruling?
20 JUDGE FARRAR: Right. That one, of
21 course, would be obvious if it goes out, but what we
22 planned to do was take the areas of concern that were
23 admitted, rework them, as we discussed in the December
24 pre-hearing conference, say these are the areas as we
25 all agreed they would be reshaped or reformulated, and

1 as you address those, here are some questions that we
2 would like to see you include in your material in
3 addressing those. So you will each get a package
4 that, in effect, says here's the new litigation game
5 plan, here are the things -- you know, you're not
6 limited to our questions, but you'd be well advised to
7 include answers to our questions in your material.
8 But, you're right, Mr. Pugsley, that would give you
9 the blueprint for your presentation on the merits.
10 MR. PUGSLEY: Thank you. I appreciate it.
11 JUDGE FARRAR: Okay.
12 MR. LEWIS: Judge Farrar, you asked if
13 there was any additional matter and staff does have
14 one other point.
15 JUDGE FARRAR: Okay.
16 MR. LEWIS: I just wanted to make
17 reference to the regulation I was referring to when I
18 said that correspondence would be in the hearing file,
19 and the reason is I want to be very precise about what
20 my representation was. It's 10 CFR Section 2.1231 and
21 it's Subsection b of that section, and I just want to
22 read one sentence. This will, I hope, make clear to
23 everyone exactly what I said is available in the
24 hearing file, and if it is not, then it's something
25 that we have overlooked somehow.

1 "The hearing file will consist of the
2 application and any amendment thereto, any NRC
3 environmental impact statement or assessment relating
4 to the application and any NRC report and any
5 correspondence between the applicant and the NRC that
6 is relevant to the application." So I thought I might
7 have heard Mr. Sugarman sort of phrasing what I had
8 said back into the record of this pre-hearing
9 conference that might have been slightly different
10 than that, but that's the requirement and that's my
11 representation as to what is in the hearing file.
12 JUDGE FARRAR: All right. Thank you for
13 that, Mr. Lewis.
14 Any other matters we need to consider
15 today? All right. Thank you all for working to get
16 us to this point. I urge you on matters involving
17 documents to communicate with each other before you
18 communicate with us in case there's a sensible way
19 that you can resolve them without getting us involved,
20 and I urge you to give Judge Abramson your closest
21 attention and cooperation to the extent that your
22 respective clients find it in their interest to do so.
23 So we will await then the April 2 filings. Thank you
24 all.
25 MR. PUGSLEY: Thank you.

1 MR. LEWIS: Thank you .

2 MR. SUGARMAN: thank you.

3 (Whereupon, at 4:24 p.m., the ASLB Pre-

4 Hearing Teleconference was concluded.)

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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: CFC Logistics, Inc.

Docket Number: 30-36239-ML:

ASLBP No. 03-814-01-ML

Location: Rockville, MD

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

Rebecca Davis

Rebecca Davis
Official Reporter
Neal R. Gross & Co., Inc.