UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

**DOCKETED 05/28/04**
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**RAS 7851**

ATOMIC SAFETY AND LICENSING BOARD PANEL
Before Administrative Judges:

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

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| In the Matter of | Docket No. 30-36239-ML |
| CFC LOGISTICS, INC. | ASLBP No. 03-814-01-ML |
| (Materials License) | May 28, 2004 |

MEMORANDUM AND ORDER
(Ruling on Requests for Stay and Related Relief)

We have before us the request of the Intervenors, representing a number of local residents who oppose the irradiator now being operated by CFC Logistics, for a "stay" of the NRC license for that facility and for related relief. That related relief initially involved Intervenors' access to documents. Now that such access has been obtained, the Intervenors are seeking sanctions -- based on the Company's alleged wrongful withholding of those documents for a considerable period -- including precluding the Company's reliance upon those documents for purposes of defending against the stay motion.[1]

This phase of the proceeding has had a somewhat complex and diffuse procedural history, which would unnecessarily complicate this decision were it to be recounted here. We will, of course, touch on that history to the extent necessary for an understanding of our ruling. In simple terms, and for the reasons stated below, we are ALLOWING the Company to rely upon the documents sought to be sanctioned and DENYING the Intervenors' stay motion.[2]

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[1] The questions Intervenors raised concerning whether other types of remedial or punitive sanctions, such as financial recompense, should be imposed, are not relevant to the grant or denial of the stay and thus need not now be decided.

[2] A preliminary matter still pending before us for decision is whether there is a basis to resolve, without calling for full written presentations on the merits, the question of the adequacy of the financial assurance required of the Company regarding eventual site decommissioning. That matter, too, has followed a complicated procedural path (cf. fn. 7, below).

1. The pending stay request faces several procedural obstacles. One of those is captured in our use of the quotation marks around the word "stay" in the second line of this opinion. That usage stems from the fact that, at the time the motion was filed, the Company was already in receipt of, and was operating under, an NRC license for its irradiator.[3]

In that circumstance, the mere presence of the cobalt-60 sources, as permitted by the license, results in a relatively constant emission of radioactivity regardless of whether food products or other materials are being processed in the irradiator. This fact raises a question about the precise nature of the relief sought, for even a "stay" of the product processing permitted by the license would not -- without the further relief of directing removal of the radioactive sources -- afford Intervenors the protection from threatened radioactive exposure that they were seeking to avoid. [4]

Another procedural hurdle involves the question of whether 10 C.F.R. § 2.1263 [5] limits Intervenors in proceedings of this nature to filing only one stay request, and that at the outset. The parties have directed our attention neither to the purpose of this provision nor to the related question of whether and to what extent later-developing circumstances are to be considered in

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[3] At an early stage, when the NRC Staff proposed to issue the Company's requested license in advance of, but subject to the outcome of, our proceeding, we considered and denied Intervenors' request for a stay of the license's effectiveness. LBP-03-16, 58 NRC 136 (2003). Had we granted that stay, the Company would not have been able to install the cobalt-60 sources in the already-constructed irradiator.

[4] We did pursue with the Intervenors our questions as to the precise nature of the practical relief being sought, but were unable to pin the matter down to our full satisfaction. See, e.g., December 11 Tr. at 374-77.

[5] Earlier this year, the Commission's Rules of Practice underwent a substantial revision. See 69 Fed. Reg. 2182 (Jan. 14, 2004). As directed therein, proceedings -- like this one -- that began prior to the February 13, 2004 effective date of the revised Rules are generally to remain subject to the provisions as they existed when the proceeding commenced. Accordingly, any references to the Rules of Practice herein will be to those otherwise-superceded provisions.

the application of the provision. [6] The Company at one point during oral argument placed reliance upon this provision, but understandably during the remainder of the argument and in its written filings devoted its attention to addressing the substantive matters presented.

Given that we find that there are substantive bars to granting the Intervenors any relief of the nature sought, we need not address the above-described potential procedural bars to such relief, and decline to do so. An answer to those perhaps thorny procedural questions can await an instance in which they are outcome-determinative.

2. Conceptually, the operative facts and the parties' positions can be outlined briefly as follows. After their first stay request was denied, the Intervenors came into possession of certain documents which they concluded raised serious concerns about the Company's capabilities to operate the irradiator in a safe manner. Put very simply, those documents established to the Intervenors' satisfaction the following two points: (1) the irradiator was a "prototype" whose operation would in effect be experimental and therefore of doubtful safety; and (2) the Company's own conduct -- including the reasoning behind certain post-licensing actions the Company and its contractors had taken to alter, and then to restore, a particular design feature of the irradiator -- had demonstrated both that the irradiator's design was unsafe and that the Company's approach to its operation was unreliable.

Although the Intervenors presented additional arguments in support of the relief sought, the assertions just stated, involving what they saw as risky design and behavior, are at the heart of their claim. As described below, it may not be surprising that they drew the conclusions

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[6] One possible purpose is that, in proceedings which contemplate the award of a license pending the proceeding, the license-holder should not later be subjected to repeated "stay" requests that would interfere with business relationships it was developing and with commercial contracts it was performing in reliance thereon. But it would seem that a concern like this could be weighed during the application of the familiar four-factor test which governs stay decisions (see text ¶ 3, below), and particularly through the third factor, which takes account of the harm that the grant of a stay would do the movant's adversary. Cf. p. 8, below.

they did from the language of the contracts and from some of the communications associated with the attempted design change. Indeed, it was because of the language contained in the irradiator sales contract and the approach taken to that design change, that these matters (1) commanded considerable attention during the oral argument portion of the prehearing conference we held in Quakertown, and (2) led us to seek additional materials thereon from the parties.[7]

To describe the design change situation briefly, a contractor inspecting the irradiator after it had been licensed by the Staff expressed some concern about the role, and the possible consequences of the employment, of a small part used in the irradiator. As a remedy, the Company changed the part to eliminate the perceived problem. The Company neglected to inform the Staff in advance of the design change**,** however, prompting the Staff, after receiving belated notification, to order that the original part be restored because the change was of the type requiring authorization by way of a license amendment. The Company thereupon restored the irradiator to its original condition. Based on the documentation available to the Intervenors at the time they filed the instant stay motion recounting this chain of events, they not unreasonably came to the conclusion that, at the Staff's insistence, the Company had restored the irradiator to a condition about which its own expert contractor had expressed reservation, and that it was continuing to operate in that (presumably unsafe) condition.

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[7] That oral argument was held on December 11, and the first additional briefs thereafter on the questions covered during the argument (see also fn. 2, above), were filed in February and March. Those briefs, and additional submissions by the Intervenors, led to another round of briefs, ending on April 12.

During the period allotted to these additional filings, we made formal our previous informal suggestion that the parties explore settlement by requesting the appointment of a settlement judge. Judge Paul Abramson was duly given that assignment. We understand that, having already held several sessions with the parties separately, he has scheduled a joint meeting in early June to pursue settlement possibilities further. In that connection, we again encourage each of the parties to look for the advantages settlement might confer upon it, compared to the less desirable outcomes that might emerge from pursuing this litigation.

As detailed at length in the subsequent submissions of the Company, however, and not undermined by the Intervenors' rejoinder, the contractor's expressed concerns about design appear upon analysis to bear upon the irradiator's efficient performance and its warranty provisions, rather than (as had been presumed by the Intervenors) upon its safe operation. The Staff agrees in that, following conversations with the Company and several of its contract partners, the Staff independently evaluated the contractor's concerns and concluded that the irradiator -- in its original condition -- provides the requisite protection of the public health and safety.

On the matter of the approach to the design change, taking into consideration the fact that no radioactive sources were on site at the time the unauthorized change was made, the Staff elected not to cite the Company formally for a violation of a license provision. It did, however, require the Company to strengthen its management control procedures to prevent future unauthorized design modifications.

In terms of the contractual agreement referring to the irradiator as a "prototype," the Company explained that its purpose was to define the obligations of the supplier in terms of guarantees of the irradiator's operating efficiency (and therefore its financial productivity), not, as the Intervenors had concluded, in terms of its radiation safety. The Company's explanation can be squared with the wording of the sales agreement**,** and supplies a commercially-legitimate interpretation different from the conclusion the Intervenors understandably drew from the language itself, before they (and we) had the benefit of the commercial history and practices the Company later provided. On this score, the Staff, in responding to very specific questions we posed to it, addressed the "new" or "unique" design aspects of the Company's irradiator and urged that they neither run afoul of the agency's licensing requirements nor pose any radiological or safety concerns.

3. At an earlier stage of this proceeding, we set out at some length the criteria which govern the grant or denial of a stay. LBP-03-16, 58 NRC 136, 140-41 (September 23, 2003). Those criteria, and the manner in which they are to be addressed, bear repetition here:

> Under the NRC's Rules of Practice, 10 CFR § 2.788(e), the criteria for ruling upon a stay request involve the same four factors as those classically applied in judicial proceedings. See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Thus, the decision-maker must consider (1) the extent of the probability that the moving party will succeed on the merits; (2) whether the moving party will suffer irreparable injury, and if so to what extent, if the stay is not granted; (3) the extent of the injury the party opposing the stay will suffer if the stay is granted; and (4) where the public interest lies.
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> Although all four factors are to be weighed in the balance, the first two -- probability of success on the merits and extent of irreparable injury -- are generally considered the more important, and the moving party has the burden of demonstrating that they weigh in its favor. The greater the showing on one of the factors, the less may have to be demonstrated on the other. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 14 (1976); Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985). Indeed, "it reasonably follows that one who establishes no amount of irreparable injury is not entitled to a stay in the absence of a showing that a reversal of the decision under attack is not merely likely, but a virtual certainty." Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 note 8 (1985). In the final analysis, then, the irreparable injury criterion "commands our attention first because it is 'often the most important in determining the need for a stay.' " Id. at 746 and note 7, quoting from cases there cited.

As thus counseled by Perry, we look first to the irreparable injury criterion.

On that score, the Intervenors' presentation does not make the necessary case, notwithstanding the intensity of their belief in its legitimacy and the depth of their concern about the license. At this stage, the question before us is whether the matters upon which Intervenors rely threaten to do irreparable injury to their interests in the time that it will take to decide the merits of the challenges to the license that are embodied in the "areas of concern" they submitted (which will be subject to written evidentiary presentations if the matter is not settled).

In the circumstances before us, to pose that question is to answer it. As to the first matter, the general concern raised by the contractual language has been explained away, to the current satisfaction of both Judge Kelber and me, as not involving a safety matter at all.

As to the second matter -- the un-doing of the design change to restore a questionable condition -- both Judge Kelber and I see that as by its very nature presenting at most a potential long-term problem, not a short-term one.[8] In particular, Intervenors are concerned that the condition could lead to possible corrosion of the material in which the cobalt-60 is encased, but that problem would by definition be a slow-developing one.[9] Thus, the resulting concern would be inadequate to support short-term stay relief even if we were to fully credit Intervenors' arguments that the irradiator design and operation does indeed give rise to the conditions and processes which could result in such corrosion, and further were to assume that such corrosion would have safety consequences despite the insolubility of the cobalt-60 -- matters we expressly decline to address given both (1) our normal inclination to say as little as possible about the merits at preliminary stages [10] and (2) the pendency of settlement negotiations (see fn. 7, above).

For similar reasons, we do not address the second factor, probability of success on the merits, other than to this extent. With there being no showing of irreparable injury, only a virtual

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[8] Similarly, given the preliminary understanding on this score that emerged at the oral argument, we were comfortable at that point that any safety risk that might exist was not of such a short-term nature as to preclude calling upon the parties to present the additional materials we believed were needed for a better understanding of the matter.

[9] As noted, the Company has provided a plausible explanation of the circumstances surrounding the attempted design change, but the current record reflects somewhat conflicting accounts of conversations that took place. We need not, for present purposes, either resolve those conflicts or determine whether they bear on the safety of long-term irradiator operation.

[10] See our first stay decision herein, LBP-03-16, 58 NRC at 145, 148. As should be apparent, then, our ruling on the stay motion is without prejudice to the Intervenors' right to attempt to show, by way of their later evidentiary presentations (if the matter is not settled), that on the merits their allegations raise a safety concern that must be alleviated if the irradiator is to continue to operate. At that stage, of course, proof, not speculation, is required.

certainty of success on the merits of the license opposition would justify a stay (see p. 6, above). As already suggested, the countering arguments presented by the Company and the NRC Staff have enough weight to preclude attaching any notion of "certainty" to Intervenors' case on the merits.

Because we can decide the pending matter on the absence of any demonstrated irreparable injury, we also need not examine the third factor, likelihood of harm to the Company. Had we done so, we would be met with the need to determine whether the Company's earlier accepting with the one hand the license "at its own risk" pending the outcome of our proceeding, precludes it from now pointing with the other hand to the obvious harm to its business relationships and financial interests that would accrue from its inability, due to a stay, to perform pending contracts that it entered into in reliance upon the license.[11]

4. As should be apparent from what is said above, we have, in reaching our conclusions, given due regard to the documents which the Company put before us, including those which the Intervenors sought, by way of sanctions, to have us disregard. We have done so for several reasons:

- The Subpart of the Rules under which this proceeding is being conducted contemplates the creation of a "hearing file" embracing the documents which the Staff had before it when it considered the license application. The Rules further contemplate that only those documents will need to be considered in order to reach a decision. Whether or not those expectations are always borne out by the facts, the documents which the Intervenors argue they should have received earlier were of a different character, and their non-disclosure was therefore consistent with Subpart L custom.

[11] With the parties' private interests, as reflected in the first three factors, not coming close to justifying a stay, we also need not look at the fourth factor, involving the public interest.

- The Licensee makes a colorable claim that, given its contractual relationships with the authors of the key documents, it was required to treat the documents as "business confidential" and not releasable.
- The Company eventually did obtain waivers from the authoring organizations that permitted release of the documents relevant to a determination of the stay motion.
- Subpart L contains a provision (§ 2.1231(d)) that makes it clear that discovery of documents not contained in the hearing file is intended to be precluded. Whether or not there might be circumstances that would justify an exception to that ban on discovery,[12] the Company was entitled to rely upon that principle at least to the extent of avoiding the type of punitive sanction -- like our disregarding the documents -- that usually would be imposed only against a party that had acted in bad faith.
- To the extent that it might be demonstrated that, even if the Company had a colorable basis for acting as it did, it did so in dilatory fashion that cost the Intervenors more expense than they should have incurred to obtain the documents, it remains open for the Intervenors to seek sanctions of a less-punitive or compensatory nature. If the entire matter is not settled (with or without inclusion of such a measure), we would entertain such a request as part of the merits presentation. As far as the parties have advised us, the question of our authority in that regard appears to be an open one as far as Commission precedents go. See Hydro Resources, Inc. (Albuquerque, New Mexico), CLI-00-08, 51 NRC 227, 243-44 (2000).

[12] The Intervenors once sought to raise this question with us, and asked that, if we agreed with their position, we refer it to the Commission for resolution. The Company's action in making some documents available has mooted that question as to those documents; as to any others, their disclosure would not bear on the ground we have assigned for denying the stay.

For the foregoing reasons, we have determined that it is not appropriate, in the circumstances presented, to impose the drastic sanction of precluding the Company from relying upon documents which shed needed light upon what appeared to be important safety concerns.

This is not to gainsay the frustration Intervenors experienced in their commendable efforts to bring this matter to light. But that frustration is not sufficient to warrant the sanction sought.

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For the foregoing reasons, the request that we impose sanctions precluding reliance upon the disputed documents and the request for a stay are DENIED.

Any review of this denial of the Petitioners' stay request may be sought under 10 CFR § 2.786(g), as applied by the Commission in Hydro Resources, CLI-98-8, 47 NRC 314, 320 (1998) and Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 214 note 15 (2002). Any petition for review should address the standards set out in § 2.786(g)(1), (2) and, given that a stay request is involved, should be filed at an early date, except that we would recommend to the Commission that the filing of a petition for review be allowed to abide the conclusion of settlement discussions.

It is so ORDERED.

BY THE PRESIDING OFFICER

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Michael C. Farrar
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 28, 2003

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| CFC LOGISTICS, INC. | ) | Docket No. 30-36239-ML |
| QUAKERTOWN, PENNSYLVANIA | ) | |
| | ) | |
| (Materials License) | ) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON REQUESTS FOR STAY AND RELATED RELIEF) 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 Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of May 2004