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

LBP-03-16

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

In the Matter of	Docket No. 30-36239-ML
CFC LOGISTICS, INC.	ASLBP No. 03-814-01-ML
(Materials License)	September 23, 2003

MEMORANDUM AND ORDER
(Ruling on Petitioners' Motion to Stay License Effectiveness)

On the evening of September 10, we heard several hours of oral argument from counsel on the motion of Petitioners (certain named residents of Milford Township[1]) for a stay of the effectiveness of the license the NRC Staff had recently issued to CFC Logistics to operate a cobalt-60 irradiator at the company's food processing warehouse in Quakertown, Pennsylvania.[2] The need to address the stay motion arose from the Company's then-stated plans to begin receiving the cobalt-60 sources at the facility (where the irradiator has already been constructed) the week of Monday, September 22.[3]

For the reasons stated herein, we DENY the stay, without prejudice to its renewal as to future shipments if circumstances change. Further, should we later grant the Petitioners' hearing request (see note 2), they will be free to renew their stay motion or to seek other remedial action at the time they file their written evidence.

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[1] Although for purposes of appearing in other venues the facility's opponents have apparently coalesced in an organization called "Concerned Citizens of Milford Township" (CCMT), that group as such has not yet sought to appear before us.

[2] As indicated in our previous Orders and in the handout we made available to the public at the oral argument (a copy of which appears at the end of this Memorandum), counsel also argued the questions of (1) the standing of the Petitioners and (2) the germaneness of the "areas of concern" upon which Petitioners base their request for a hearing on the merits of the company's application/license. We will address those questions at a later time. For now, we can put them aside (see pp. 6, 10, below).

[3] See Aug. 26 Tr. at 16. But see last sentence of note 20, below, regarding a shipping delay.

A. Background. In view of the urgency of this matter, we will not pause to provide the full background that led to this stage. Instead, we focus briefly on only the following.

CFC Logistics filed its application for an NRC materials license on February 25, 2003. At that point, the NRC Staff, before whom the application was pending, elected not to issue a formal notice of opportunity for hearing.[4] Thus, the time for filing a petition for a hearing on the merits of the application did not begin to run until Petitioners received actual notice of the application's pendency. As it turned out, the Petitioners filed their first hearing request on June 23, 2003.

After this tribunal was established on July 14, the NRC Staff -- as is its right under 10 CFR § 2.1213 -- informed us by a July 24 letter that it elected not to participate in the proceeding. Notwithstanding that election, we directed the Staff to participate -- as that same provision authorizes us to do -- "at least to [the] extent" of the "resolution of the preliminary issues . . . ." July 31 Order, pp. 1-2 .

At the outset, there were a number of disparate filings, with CFC Logistics responding to the Petition and to various other filings Petitioners made, all of which need not be recounted here. To bring some focus to the proceeding, we directed the Petitioners to file a document indicating the respective distances the several Petitioners live from the facility and then to re-state the "areas of concern" upon which they based their request for hearing. See Aug. 13 Prehearing Order, p. 2.

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[4] When asked later about the basis for this determination, counsel replied that the Staff handles "many thousands" of materials license applications annually and its practice is not to issue formal notices of hearing on them (Aug. 7 Tr. at 25-26)[the numbering of both the August 7 and August 26 Transcripts began with Page 1; thereafter, page numbering of new transcripts took up where the previous one had ended]. As we understand it, however, only a minuscule proportion of those thousands of applications involves proposed irradiators or other devices involving similar radioactive potency.

In that same Order, we called for the NRC Staff to respond to the filings the Petitioners were about to make by briefing the issues of Petitioners' standing and the "germaneness" to the proceeding of the areas of concern Petitioners sought to raise.[5] The Company and the Petitioners were then to respond to the Staff brief, so that all issues would be properly joined.

Responding to increasing interest in the local community, the Staff eventually determined to hold a public meeting on the evening of Thursday, August 21, to receive the public's comments and concerns. According to an unofficial transcript later supplied us by Petitioners,[6] the Staff began the meeting by indicating that once the public's remarks on the Company's application were listened to and reported back, the license would be issued "in the next few days." Later portions of that transcript, confirmed by contemporaneous news reports, [7] indicated that that announcement did not sit well with the audience.

This disclosure prompted the Petitioners to file the next day a request that we stay the issuance of the license. This prompted a flurry of rulings and a conference call (see Aug. 26 Tr.

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[5] In that regard, we had indicated in the first telephonic prehearing conference our intense interest, as far as the issue of standing was concerned, in whether this irradiator fit within the NRC jurisprudence about "a significant source of radioactivity producing obvious potential for offsite consequences." Aug. 7 Tr. 33-34, 36, 74-75, 79-81. Accordingly, in our August 13 Order directing the NRC Staff to file a brief on the questions of standing and germaneness, we indicated that brief should:

> "pay particular attention to the question the parties have raised as to whether, for standing purposes, the radioactive source is to be considered in the shielded position it would occupy in the irradiator or, as the Applicant characterized the opposing viewpoint, in unshielded 'isolation' (see Tr. 74-75, 79-81), and . . . then provide the Staff's view on whether, applying the standards the Staff believes appropriate, the Petitioners have standing . . . ."

In our estimation, the Staff brief left some matters open (Tr. at 92-93; see also id. at 114-18), prompting us to call for a supplemental brief (see Sept. 3 Prehearing Order), which left us unclear as to an aspect of the Staff's position on this matter (see Tr. 127).

[6] According to her declaration, Kimberly Haymans-Geisler, a member of CCMT and an attendee at the meeting, prepared that partial transcript from a videotape provided to her.

[7] See, e.g., Greg Coffey, "Irradiator Approved", The Intelligencer [phillyBurbs internet edition](Aug. 22, 2003).

at 7) during which we denied the stay request -- which did not expressly address the "four factors" that govern decisions on stays (see p. 5, below) -- as premature, without prejudice to its later renewal. See Aug. 27 Further Scheduling Order.

As had been projected during the conference call (Aug. 26 Tr. at 8), the Staff issued the license the next day, August 27, and the Petitioners renewed their stay motion on September 4. For our part (see Aug. 27 Further Scheduling Order and Sept. 3 Prehearing Order), we called for rapid replies and included the stay motion on the September 10 oral argument agenda.

A day after issuing the license, the NRC Staff also issued a separate order regarding the facility security plan, imposing a standard upgrade required of all licensees; pursuant to a Commission directive, the Staff informed the Company that the upgrade would not have to be in place until December 3, 2003 (see Sept. 5 Notification to Board and accompanying documents). At the oral argument, in response to the Company's assertion that it nonetheless intended to have the upgraded security plan in place by Friday, September 12, we asked the Staff if it would be able -- in light of the pendency of the stay request and the focus being placed on the security plan for that purpose -- to conduct a rapid inspection to confirm that the Company had indeed done what it had pledged (Tr. 247-52). The Staff demurred on making any commitment at that point (Tr. 252).

At the end of the argument, we gave the parties two days to supply us with any factual information they had been unable to provide at the argument (Tr. at 266). In view of the lateness of the hour and the travel contingencies facing the Company's counsel (discussed during the brief recess reflected at Tr. 224, lines 8-9), we did not pause to recount with the parties what those areas might include. One area on which we expected more information, however, concerned the number and size of existing licensed irradiators, upon which there had been conflicting reports (compare, e.g., Sept. 9 Stein Affidavit, ¶ 13 with Tr. 144-45).

Rather than supply that information, however, the Staff favored us with a September 12 letter brief advising us, in effect, that (1) the Staff could not conduct an inspection of this facility until it completed a manual on how to inspect all facilities; and (2) in any event, we have no jurisdiction to direct the Staff to conduct an inspection. As we see it, the portion of the letter asserting we lacked jurisdiction answered a question not asked and addressed a matter not in issue. [8]

B. Criteria for Granting a Stay. 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.

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

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[8] Specifically, we had not said anything that reflected an intention to direct the Staff to conduct an inspection. We had merely asked, in the context of a stay request in which the status of the Company's Commission-required anti-terrorist plans was being made a major issue, whether the Staff would be able to conduct an early inspection to confirm the Company's having taken action to comply -- three months early -- with a new NRC requirement. See Tr. 247-52, 266-67. On that score, the Company invited an early Staff inspection (Tr. at 263-64).

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.

In light of the attention this matter has received in the community, we should point out that, as to the fourth factor -- relating to the "public interest" -- what is being weighed is not the position being taken by members of the "interested public." Rather, this factor looks to whether there are public policies or values, distinct from the private interests bound up in the other three factors, that would be served, on the one hand, by a grant of the stay or, on the other, by its denial.

C. Application of the "Four-Factor" Stay Criteria to this Proceeding. The early portions of the September 10 oral argument dealt with the questions of the Petitioners' standing to seek a hearing on the merits of the CFC application/license and the germaneness of the "areas of concern" that reflect the challenges they wish to bring. We will address those matters in a later opinion, which we expect to issue by mid-October. For purposes of ruling on the stay motion, we will assume that at least some of the Petitioners do indeed have standing,[9] and that at least some of their areas of concern are germane and thus can be the subject of the hearing.[10]

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[9] The NRC Staff supported the Petitioners' claim to have standing, but on theories that required further explanation (see Company Sept. 5 Brief, Section II.A., and Tr. at 127, 128-29).

[10] The Petitioners presented some 16 areas of concern, all of which the Company argued were not germane but seven of which the NRC Staff argued were legitimate subjects for hearing.

Taking our cue from the Appeal Board's decision in Perry, above, we address the irreparable injury factor first. For, as has been seen, the determination we make on that factor will influence the role the others play.

1. Irreparable Injury to Petitioners. In their brief and at oral argument (Tr. at 227-28), Petitioners placed considerable reliance on the decision of the United States Court of Appeals for the Sixth Circuit in State of Ohio ex rel. Celebrezze v. NRC, 812 F.2d 288 (1987), for the proposition that "increased imminent risk" can constitute irreparable injury. We think that decision will not, in the circumstances before us, bear the weight Petitioners attempt to place upon it here, given the nature of the risks they describe (see Subsection 2, below).

In Celebrezze, the State argued that the NRC should be prohibited from issuing a full power operating license to the Perry Nuclear Plant until an "adequate offsite emergency evacuation plan" was developed. 812 F.2d at 291. Finding that the State had "demonstrated a sufficient probability of success on the merits," the Sixth Circuit indicated that to substantiate an irreparable injury claim, a movant "must provide some evidence that the harm has occurred in the past and is likely to occur again." Id. at 290, 291. On that score, the Court of Appeals found the then-recent accident at Chernobyl instructive and held that, in light of the situation that occurred there, "it would be unconscionable to allow the full power license to issue absent adequate emergency preparedness plans." Id. at 291. The Court of Appeals concluded that while "it is difficult to visualize particular scenarios, . . . when dealing with a force as powerful as nuclear energy every effort should be made to minimize risks." Id.

We think the Sixth Circuit's rationale there to be inapplicable here on several grounds. As that Court stressed, there is an "inversely proportional" relationship between the strength of the "probability of success" showing and the "irreparable injury" showing. 812 F.2d at 290. With respect to the merits, the Court detailed the efforts the State had made in withdrawing from,

and providing a critique of, the emergency evacuation plan, and commented favorably upon the "findings which articulated the plan's deficiencies" made by an Ohio "cabinet-level task force," all as brought to the Court's attention through the lengthy affidavit of that Task Force's chairman. Id. at 291.

In other words, the Sixth Circuit believed the State had made out a strong case of probability of success on the merits and, under the Court's classic reasoning, the irreparable injury showing could be correspondingly less. In contrast, without unduly minimizing the nature of the concerns Petitioners are bringing before us here, the matters they have presented thus far do not create such a strong showing as to probability of success (see pp. 10-14, below), so their irreparable injury showing must be correspondingly greater.

On the subject of irreparable injury, the Sixth Circuit seemingly put great weight on the existence of a prior accident (Chernobyl) and "a force as powerful as nuclear energy." 821 F.2d at 291. In the matter before us, however, where a stronger irreparable injury showing is needed, there has been no showing of prior accidents -- indeed, the suggestion is that, as to a key accident scenario, there have been no "cask drop" accidents at any irradiator (Tr. 259-60, 262) -- and no definitive indication (as opposed to informed speculation) of why such an accident should, for purposes of a stay, be anticipated. And in terms of the forces at work, the presence of cobalt-60 in an irradiator, while of legitimate and expressed concern to the surrounding residents, cannot fairly be compared to the concern the Sixth Circuit expressed about "a force as powerful" as a nuclear plant operating at full power.

We need add only a comment on the Company's post-argument suggestion that we cannot inquire, at any hearing on the merits of the matters before us in this proceeding, into the

issue of the Company's compliance with the latest Commission directive on security plans, an issue the Company and the Staff say would have to involve a separate proceeding. Whatever the legitimacy of that suggestion as far as a merits hearing goes,[11] we believe -- but need not decide here -- that for purposes of an "irreparable injury" determination, it is legitimate for Petitioners to attempt to put forward a showing of terrorist-related consequences attributed to deficiencies in compliance with the Commission's security directives. But that showing falls short of being convincing here, because the Company has, for purposes of the stay motion, countered the Petitioners' showing by its representation -- albeit unfortunately left unconfirmed by the Staff [12] -- that its full-scale plan will be in place before any cobalt-60 reaches the site (see Exhibit B to the Company's Sept. 9 Response to the stay motion).

None of the Petitioners' other claims of irreparable injury goes beyond speculation as to accidents that might happen, unsupported by recounting past events at irradiators or by presenting substantial chains of causation.[13] Although an eventual hearing on the merits may demonstrate safety deficiencies, the totality of the Petitioners' showing thus far -- including the matters they presented that we discuss in Subsection 2, below -- does not establish any significant likelihood of irreparable injury from "increased imminent risk" (Tr. at 228) of the type

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[11] Whether the merits of that issue may be heard in this proceeding is not a matter that need be dealt with herein. We will turn to it later, in our upcoming decision on standing and germaneness.

[12] In different circumstances or in a closer case, the absence of Staff confirmation could well throw the balance of stay considerations the other way.

[13] Of course, the Petitioners' efforts were hampered, or at least delayed, by their lack of ready access to key documents (see, e.g., Aug. 26 Tr. at 16-29), a problem on which we have already -- and unexpectedly (see Aug. 7 Tr. at 24, 75-76, 83-84; Aug. 21 Scheduling Order; Aug. 26 Tr. at 13-15) -- had to intervene on several occasions despite the experienced counsel involved. We do not expect to have to do so unnecessarily again (see Aug. 26 Tr. at 86).

the Sixth Circuit thought confronted it. Accordingly, we cannot weigh this factor in Petitioners' favor. [14]

2. Probability of Success on the Merits. Against this background of a minimal showing on the irreparable injury factor, the Petitioners would have to show, as the Sixth Circuit made clear, a correspondingly higher probability of success on the merits in order to prevail in the weighing of the four factors. We turn now to an analysis of whether such success has been demonstrated.

As indicated above, we are assuming, for purposes of this stay motion, that at least some of the Petitioners will be found to have standing and that at least some of their "areas of concern" will be found germane. If that transpires, a hearing on those concerns, involving written presentations at the outset, will take place.[15]

Of course, the "probability of success on the merits" factor, insofar as relevant to stay motions, does not go to whether Petitioners will succeed in obtaining a hearing. Rather, it goes to whether at such a hearing they will succeed, with regard to one or more of the concerns they

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[14] To be sure, in an earlier proceeding the manufacturer of this irradiator -- faced with an assertion by the NRC Staff that its plans to use cesium-137 (in the form of cesium chloride "caked powder") as a radioactive source (in a different irradiator) were deficient because cobalt was safer -- argued that cobalt had a number of deficiencies of its own. In the Matter of GrayStar, LBP-01-07, 53 NRC 168, 172, 188-89 (2001). Upon examination, those stated deficiencies appear less to create safety consequences for nearby residents than to detract from operating efficiency, and thus do not bolster Petitioners' irreparable injury case to any substantial degree (see also Tr. at 157-58; cf. Tr. at 188-92).

[15] How soon such a hearing would take place remains to be seen. Because the NRC Staff did not publish a notice of hearing at the outset (see p. 2, above), the Rules of Practice governing materials licenses would, if our ruling is in favor of Petitioners' intervention, require us to issue a notice of hearing providing 30 days for prospective additional intervenors to file petitions. See 10 CFR § 2.1205(d)(i), (j), (k). It also remains to be seen whether in that circumstance it would be permissible -- while awaiting responses to that notice from potential new petitioners -- to begin the written presentation process as to the existing Petitioners (or, if permissible, whether it would be prudent and efficient to do so).

have raised, in demonstrating a safety deficiency in the irradiator itself, or in the Company's compliance with the standards governing the irradiator, that would lead us to invalidate, or to condition, the license the Staff awarded.

As indicated above, the Petitioners have pointed to some 16 concerns they say justify a hearing. In presenting their written arguments in support of a stay, they focused on five key concerns: (1) the inadequacy of security measures; (2) the risk of accidental dispersion of radioactive material in air and water during loading, unloading, and transportation; (3) the absence of emergency procedures for dealing with a prolonged loss of electricity or for the range of accidents that could be caused by such a loss; (4) the absence of emergency procedures for accidents involving a break in the compressed air line; and (5) the inadequacy of the $75,000 bond to cover post-accident clean-up costs. At oral argument, they placed primary emphasis on the first four items (Tr. at 228, 237, 240, 241-42).

We discuss each of those concerns below. Before doing so, we stress that the burden to show that an area of concern is germane -- and thus can trigger a hearing -- is a relatively light one. 10 CFR § 2.1205(e)(3),(h). In contrast, the burden to demonstrate "probability of success" on the merits -- and thus to obtain a stay -- is a much heavier one (see 10 CFR § 2.788(e) and pp. 5-6, above).

Put another way, it is much more difficult to establish that one will prevail at a hearing than that one is entitled to a hearing.[16] As to the former, we can again take a cue from the

[16] For purposes of triggering a hearing, our Rules of Practice do make it easier, in a Subpart L materials license proceeding like this one, to demonstrate that an "area of concern" is "germane," than to establish, in a Subpart G proceeding like those involving nuclear power plants or spent nuclear fuel storage facilities, that a "contention" is sufficiently specific and supported by a sufficient "basis." Compare 10 CFR § 2.1205(h) with 10 CFR § 2.714(b)(2).

Appeal Board's opinion in Perry (22 NRC at 746) to the effect that "[w]here no threat of irreparable injury is established, both the need for and the wisdom of our precipitous pronouncement on the merits of the [movant's] claims are doubtful at best." Accordingly, we keep our remarks on the merits to a bare minimum, so as not even to appear to prejudice the actual consideration of those claims, if in fact such consideration later takes place.

a. *Security Plans*. As discussed above in connection with irreparable injury, the Company has represented that it would take the steps necessary to comply with the latest Commission security directive before any radioactive sources are received on site (as noted, the NRC Staff has not taken the opportunity to confirm the Company's compliance). The issue is surely an open one, but -- unlike the information the Sixth Circuit had before it as to the deficiencies in the Ohio emergency evacuation plan -- nothing comparable before us indicates the Petitioners have the requisite high probability of success on the merits in establishing that deficiencies exist.

b. *Accidental Dispersion*. The Petitioners have posited different accident scenarios. But thus far none of those scenarios focuses on how the solid (essentially water-insoluble), doubly-encapsulated cobalt metal source (in contrast, say, to the cesium powder that was the problem in the earlier GrayStar irradiator mentioned in note 14 above) lends itself to ready dispersion in accident situations. If we get to the hearing stage, it will be open to Petitioners in their written presentation to demonstrate, more specifically than they have so far, the safety problems and dispersion pathways in accident situations. With an apparent lack of prior, similar accidents (like "cask drop") to look to, and with the irradiator designed to offer some physical and administrative protections to the sources when cask loading and unloading is taking place, we are unable to say now there is a high probability of success on this issue.

c. *Electricity Loss*. A principal concern the Petitioners expressed about electricity loss -- a situation they correctly assume can be expected to occur from time to time -- was the loss of cooling capability. But it appears that the heat generated by the presence of the radioactive sources is of a low order that would simply lead to slow evaporation of the pool water, a matter that can be resolved by the ready addition, without electrical power, of more water. Whether the matter is as simple as the Staff would have it,[17] we again have yet to see an analysis that would lead us to believe in the requisite high probability of Petitioners' success.

d. *Air-Line Break*. In the design of this irradiator, the air-lines serve two purposes: (1) maintaining sufficient pressure in the "bell" (containing the product to be irradiated) to prevent pool water from entering its open bottom; and (2) circulating air within the plenum that holds the radioactive sources. In the first instance, the failure of the air-line leads most directly to rendering the product unusable; the suggestion that spoiled product would clog the system (in a pool that has no drains) in a manner that affects public safety (as opposed to product quality) remains to be demonstrated. As to the second instance, the Company asserts that the air is not needed for cooling or other safety reasons. On this point, the Staff (see Sept. 9 Kinneman Affidavit, ¶ 6) indicates that the "double encapsulated sources are designed to be continuously in contact with either air or water or to cycle between the two." We await -- but cannot now point to -- the Petitioners' rejoinder to that claim.

e. *Bond Sufficiency*. The Staff indicates that the bond to be posted by the Company is in compliance with existing Commission regulations. The manner in which pending changes in that requirement may affect this proceeding is uncertain. But where Commission regulations

[17] In response to our question (Tr. 254), Staff counsel opined that the solution to this problem was not a "diesel generator" (to supply emergency power) but a "garden hose" (to refill the pool).

are concerned, the belief of project opponents that the regulations are inadequate to serve their safety purpose leaves, at the least, much to be done before success on the merits is within grasp.

With the movants having thus failed to make the required strong showing on either the "irreparable injury" factor or the "probability of success" one, we need devote little attention to the other two factors. We treat them briefly below.

3. Injury to Company. The Company essentially failed to provide us orally key information we had requested on a point relevant to its potential injury, i.e., the general schedule for the receipt on-site of the cobalt-60 sources. [18] Similarly, its written representations in opposing the stay -- concerning the possible diversion to its suppliers' other customers of sources it was unable to take in timely fashion -- were insufficiently specific about lost time and opportunity, and left too much to speculation, to be given much weight in the four-factor balance. Response to Stay, ¶ III.C; compare Tr. at 259.

4. The Public Interest. In this proceeding, we were not cited to any significant or overriding public interest factor to consider. There appears to be no national policy favoring (or opposing) the rapid deployment of irradiation facilities (cf. Tr. at 258). The public interest, of course, favors assuring the safety of facilities regulated by the NRC, but that public interest factor has, in effect, already been considered, i.e., it is an element of the two factors dealing with probability of success on the (safety) merits and the extent, if any, of the irreparable (safety-related) injury to the Petitioners.

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[18] See Aug. 25 Order Scheduling Responses, framing the initial question; Sept. 2 Tr. at 98, expanding upon it; and Tr. at 225-26, where counsel indicated the Company had "no idea" as to overall shipment schedules but said that the first one would be for "less than 1 million curies." The unhelpfulness of that latter answer was readily recognized not only by us but, in the only breach of decorum during the oral argument, by the courtroom spectators. Tr. at 226.

D. Conclusion. In sum, applying the criteria in the appropriate fashion (see pp. 5-6, above), and with the burden of persuasion on the Petitioners at this stage (see p. 5, above), the balance of the four factors weighs against the grant of the stay. As far as matters before us are concerned, then, the Company is free to proceed with its plans to load the cobalt-60 sources into the already-constructed irradiator.

As its counsel readily conceded in a prehearing conference call and at the oral argument, however, if the Company elects to do so it will be proceeding at its own risk. Aug. 26 Tr. at 46-47; Tr. at 261. That is, the Company recognizes that the ultimate legitimacy of the license under which it will, for now, be proceeding, although awarded by the NRC Staff, is subject to the outcome of this proceeding (not only at our level but, if appeals are taken, at the Commissioner level and in the federal courts). In other words, if at any future point in NRC-related litigation the award of the license is rescinded, the Company will be required to remove the cobalt-60 sources, and to take any remedial action that might be appropriate, without regard to any sunk costs it may have incurred.

In denying the requested stay, we intend to express no opinion on either (1) the issues of Petitioners' standing and the germaneness of the areas of concern they have presented or (2) the merits of any of those concerns that may make it to hearing. But we do think it

appropriate to acknowledge the concern the Petitioners have alluded to during our conference calls, in their written briefs, and at the oral argument, about less than ideal communications, which apparently have exacerbated their suspicions or fears.[19]

One final matter deserves mention. As noted earlier (p. 2, above), the NRC Staff elected at the outset not to participate in this proceeding, but we overrode that election and directed the Staff to participate, "at least" in "the resolution of the preliminary issues." Except for the rendering of our upcoming decision on standing and germaneness, that early stage is now concluded. In light of the course the proceeding has taken, we are not extending any further our direction to the Staff to participate, and -- subject to subsequent developments -- the Staff's election not to participate will thus have operative effect from this point forward.

For the reasons expressed herein, the Petitioners' stay request is DENIED, without prejudice to its renewal if circumstances change. Further, the Staff's election not to participate in the proceeding is REINSTATED.

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[19] For example, the members of the public who are individual Petitioners have questioned the failure to notice the application for hearing (a failure which, we have already noted, threatens to delay any later hearing phase)(see p. 2 and note 15, above); the delay in providing key application-related documents (which also required far more attention from us than was warranted)(see note 13, above); and the confusion that resulted from announcing that public comment would be entertained one evening, but that the license would (apparently without regard to the content of the comments) in any event be issued soon after (see p. 3, above). The public understanding of NRC processes and responsibilities undoubtedly could have been enhanced, and a number of apparent misunderstandings been avoided, if these matters had been handled differently, in keeping with the emphasis on communications that NRC Chairman Diaz has made a watchword of his tenure and that Commissioner Merrifield placed great emphasis upon earlier this year. See, e.g., NRC Chairman Nils J. Diaz, "Crossroads and Cross-Cutting," delivered to the International Congress on Advances in Nuclear Power Plants (May 5, 2003); and NRC Commissioner Jeffrey S. Merrifield, "What's Communication Got to Do With It?," delivered to the 2003 Regulatory Information Conference (April 17, 2003).

Pursuant to 10 CFR § 2.786(b)(1), Petitioners may, within fifteen days of the issuance of this Memorandum and Order, seek review by the Commission[ers] of this denial of their stay request. That same provision makes seeking Commission review a prerequisite to seeking judicial review.

It is so ORDERED.

BY THE PRESIDING OFFICER

/RA/

Michael C. Farrar
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 23, 2003 [20]

Attachment: 1st Page of Courtroom Handout

[page 2 of handout was NRC September 3, 2003 Press Release; page 3 was excerpt from June 12, 2001 Federal Register Notice regarding security and decorum at NRC proceedings]

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

[20] As the parties were informed by electronic mail shortly after 4:00 P.M. on Friday, September 19, the hurricane-related office closings and related dislocations in the DC area on the 18th and 19th delayed the issuance of this opinion from the promised "next Friday night" September 19 (see Tr. at 267) to early this following week. A change in the cobalt-60 shipping schedule, about which the Company had informed us earlier on September 19, made the slight delay in the release of this opinion on the stay motion not consequential in terms of the timing of its relationship to the new shipping schedule.

U. S. NUCLEAR REGULATORY COMMISSION

ORAL ARGUMENT OF COUNSEL
IN CFC LOGISTICS MATERIALS LICENSE PROCEEDING

WEDNESDAY, SEPTEMBER 10, 2003
5:30 - 8:00 P.M.

COURTROOM 1A
LEHIGH COUNTY COURT OF COMMON PLEAS
ALLENTOWN, PA.

Before Administrative Judge Michael C. Farrar, Presiding Officer
and Administrative Judge Charles N. Kelber, Special Assistant

Appearances of Counsel

For Petitioners (certain named citizens of Milford Township)
Robert J. Sugarman and Diane Curran

For the NRC Staff
Stephen H. Lewis

For CFC Logistics
Anthony J. Thompson and Christopher S. Pugsley

Order of Argument (equal time for each side of each issue;
adjustments in the times allotted may be made as the argument unfolds)

"Standing" of the Petitioners -- 40 Minutes:

Petitioners 10 minutes
NRC Staff 10 minutes

CFC Logistics 20 minutes

"Germaneness" of Petitioners' Areas of Concern -- 40 Minutes:

Petitioners 10 minutes
NRC Staff 10 minutes

CFC Logistics 20 minutes

Petitioners' Motion for Stay of License Effectiveness -- 60 Minutes

Petitioners 30 minutes

NRC Staff 10 minutes
CFC Logistics 20 minutes

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
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 PETITIONERS' MOTION TO STAY LICENSE EFFECTIVENESS) (LBP-03-16) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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

Administrative Judge
Michael C. Farrar
Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles N. Kelber
Special Assistant
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

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Docket No. 30-36239-ML
LB MEMORANDUM AND ORDER (RULING ON PETITIONERS' MOTION TO STAY LICENSE EFFECTIVENESS) (LBP-03-16)

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of September 2003