UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION **DOCKETED 10/29/03**
ATOMIC SAFETY AND LICENSING BOARD PANEL

RAS 6954 LBP-03-20

Before Administrative Judges: **SERVED 10/29/03**
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)	October 29, 2003

MEMORANDUM AND ORDER
(Ruling on Petitioners' Request for an Evidentiary Hearing)

Summary. We have before us the petition of some 25 individual residents of Quakertown, Pennsylvania (the Petitioners) for a hearing that would give them the opportunity to present evidence challenging the application of CFC Logistics, Inc. (the Company) for an NRC license to operate a cobalt-60 irradiator at the Company's food processing warehouse in Quakertown. For the reasons stated below, we find that (1) the Petitioners' hearing request was timely filed, notwithstanding the irregularity of its original service on the Company; (2) at least some of the Petitioners have established their standing to seek relief here; and (3) a number of the Petitioners' proffered "areas of concern" are germane to this proceeding. As a result, we GRANT the Petitioners' hearing request.

Background. We previously had occasion to recount much of the background that led to this point. Specifically, after the Petition was filed, the NRC Staff completed its review of the application and, on August 27, as NRC rules permit it to do in Subpart L (informal) proceedings, issued the Company the license it sought, subject to the outcome of this proceeding.[1] That led to our issuing a September 23 Memorandum and Order denying the Petitioners' motion for an interim stay of the effectiveness of that license, in which we necessarily covered much of the

[1] See 10 CFR §§ 2.1205(m), 2.1263. In that regard, this tribunal, while part of the NRC, exercises a judicial function that operates independently of the NRC Staff's regulatory function.

background relevant here. See LBP-03-16, 58 NRC ___, ___ (slip op. at 2-5) (2003). Accordingly, we need summarize only briefly here the steps that have led to this point.

On February 25, 2003, the Company filed an application for an NRC materials license to operate at its Quakertown cold storage facility a self-contained, underwater cobalt-60 irradiator to irradiate food products and other materials. Following the Petitioners' filing of a hearing request on June 23, a number of somewhat diffuse filings were made by both the Petitioners and the Company.

In an effort to bring more focus to the proceeding, we held a telephonic prehearing conference on August 7. During that conference call, we directed the Petitioners to file additional documents indicating the actual distances of each Petitioner's residence from the facility and briefly restating the "areas of concern" they sought to raise. See Aug. 7 Tr. at 42-45.[2]

During that same conference, we instructed the NRC Staff -- which up to that point had elected not to submit any papers to us -- to respond to the Petitioners' upcoming filing by briefing the questions of the Petitioners' standing and the germaneness of their areas of concern. See Aug. 7 Tr. at 74-75; Aug. 13 Order at 2. The other litigants were then to respond to the Staff's position.

As we moved forward on the adjudicatory front, the NRC Staff continued its efforts on the regulatory front, eventually disclosing at an August 21 public meeting in Quakertown that it intended to issue the CFC license within the next few days. In response to that announcement, Petitioners filed the following day a motion to stay the issuance of the license.

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[2] 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. See also Prehearing Order (Scheduling Additional Filings and Possible Oral Argument) (Aug. 13, 2003) at 1-2.

In an August 27 Order memorializing determinations made during a conference call held the previous day, we denied the Petitioners' stay request as premature, without prejudice to its later renewal after the issuance of the license. See Further Scheduling Order (Aug. 27, 2003) at 1. As anticipated, the Staff issued CFC its license on August 27, prompting the Petitioners, on September 4, to renew their stay motion.

At an oral argument held during the evening of September 10 in the Historic Lehigh County Courthouse in Allentown, Pennsylvania, we heard argument from counsel on three issues: whether Petitioners have standing to challenge the application/license; whether their "areas of concern" are germane to matters we have authority to consider; and whether they were entitled to a stay of the effectiveness of the license. As indicated above, we denied Petitioners' stay motion in our September 23 Memorandum and Order, without prejudice to its renewal as to future shipments of cobalt-60 if circumstances change or (if their request for hearing were granted) when they file their written evidentiary presentation. See LBP-03-16, above, 58 NRC at ___ (slip op. at 1).

The issues debated at the oral argument were tied closely to governing NRC regulations, which call upon us to determine, in considering Petitioners' request for hearing, whether (1) their petition was timely filed and properly served; (2) they have standing; and (3) their specified areas of concern are germane. See 10 C.F.R. § 2.1205(d)(2), (f), and (h). In Parts I (pp.4-6), II (pp. 7-14), and III (pp. 15-28) of this opinion, below, we address whether the Petitioners have satisfied each of these required elements. Determining that they have, we go on to set out in Part IV (pp. 29-33) a plan for the future course of this proceeding.

I. TIMELINESS AND SERVICE OF REQUEST FOR HEARING

In a materials license proceeding, petitioners requesting a hearing on a pending application must abide by the filing and service requirements set out in 10 C.F.R. § 2.1205. Under Section 2.1205(d)(2), if -- as occurred in the instant proceeding -- the NRC Staff elects not to publish in the Federal Register at the outset a formal notice of opportunity for a hearing, a request for hearing must be filed within the earliest of the following periods: (1) 30 days after the requester receives actual notice of a pending application; (2) 30 days after the requester receives actual notice of an agency action granting an application in whole or in part; or (3) 180 days after the agency action granting an application in whole or in part.

As we noted above, Petitioners filed their request for hearing on June 23, 2003 (but, as we note below, did not serve it on the Company until July 15). According to the request, two of the 25 named petitioners had become aware of the pending application on May 23, 2003, while the remaining 23 petitioners learned of it later, on or before June 19.[3] In challenging the timeliness of a document Petitioners filed on July 17 that the Company calls Petitioners' "second hearing request," the Company argues that given the number of public meetings held and the amount of media coverage regarding the planned irradiator, it is reasonable to assume that Petitioners received actual notice of the pending license application at some point before

[3] See Letter from Robert J. Sugarman, Counsel for Petitioners, to John Kinneman, NRC Region I Nuclear Materials Safety Branch 2 Chief (June 23, 2003) at 1-2 [hereinafter Hearing Request]; and Exh. C to Reply of Requestors to CFC Logistics, Inc. Response Regarding the Application for a Materials License (July 17, 2003) [hereinafter Petitioners' Reply to CFC Response].

June 19, 2003.[4] Consequently, the Company asserts, the Petitioners' "second hearing request" should have been filed "well before July 19, 2003" and should therefore be rejected as untimely. CFC Response to Petitioners' Reply at 13.

The Company's argument is misdirected. Because the Petitioners' July 17 filing was not a second hearing request, but rather a reply to the Company's July 10 response (see note 4, above), the only hearing request before us is the one filed by Petitioners on June 23 (which it admittedly served initially only on the Staff, serving the Company late, on July 15). Petitioners represent that they each received actual notice of the CFC application between May 23 and June 19. For its part, the Company has failed to proffer any evidence demonstrating that Petitioners received actual notice prior to May 23, 2003, which would put their hearing request outside the prescribed 30 day-period. Accordingly, on the record currently before us, the Petitioners' request for hearing was timely filed on June 23 (June 22 fell on Sunday).[5]

In addition to requiring timely filing, NRC regulations dictate that a request for hearing must be properly served by personal delivery or by mail both to the Applicant and to the Staff (by delivery to the General Counsel at NRC headquarters). See 10 C.F.R. § 2.1205(f). Relying on advice assertedly given by counsel for the NRC Staff's Region I office, Petitioners filed their June 23 request for hearing not only with the NRC General Counsel but also with the Region I

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[4] See Response of CFC Logistics, Inc. to Petitioners' Second Request for a Hearing Regarding the Application for a Materials License (Docket No. 30-36239-ML) (July 28, 2003) at 10-12 [hereinafter CFC Response to Petitioners' Reply]. Although the Company repeatedly refers to the Petitioners' July 17 filing as "Petitioners' Second Hearing Request," what the Petitioners actually submitted on that date was a reply to the Company's July 10 response to their June 23 hearing request.

[5] We note that, in promulgating the Subpart L procedural rules, the Commission expressly rejected the suggestion that the actual notice requirement be changed to one turning on whether the petitioner knew or should have known of the pending application based on factors such as newspaper accounts. See Final Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 54 Fed. Reg. 8,269, 8,272 (Feb. 28, 1989).

Nuclear Materials Safety Branch 2 Chief.[6] Failing to observe all the tenets of Section 2.1205(f), however, Petitioners did not at that juncture serve a copy of their request on the Company.

It was not until a week later, on June 30, that CFC was notified of the hearing request by the NRC's Region I office. Thereafter, on July 10, the Company filed its answer to the Petitioners' hearing request, noting the absence of direct service upon it. Subsequently, on July 15, Petitioners filed a "Contingent Motion for Waiver of Section 2.1205(f)" and themselves served CFC with their June 23 hearing request.

Notwithstanding the Company's concern that overlooking Petitioners' failure to comply with applicable service requirements may encourage litigants in future NRC proceedings to attempt to circumvent procedural rules,[7] we are not inclined to reject Petitioners' hearing request on this technical ground rather than consider its substance, particularly in light of the informal nature of Subpart L proceedings like this one.[8] We would have considered reaching a different result had the Company shown that it was materially prejudiced in some manner by not receiving service of the request on June 23. Perhaps not surprisingly, no such showing has been attempted, much less made.

Having declined to deny the Petitioners' hearing request on procedural grounds, we now consider the substance of that request. This involves us in the issues of Petitioners' standing and the germaneness of their areas of concern.

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[6] See Petitioners' Reply to CFC Response at 8.

[7] See Response of CFC Logistics, Inc. to Petitioners' Request for a Hearing Regarding the Application for a Materials License (Docket No. 03036239) (July 10, 2003) at 8 [hereinafter CFC Response to Hearing Request].

[8] See also Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979) (declining in a Subpart G proceeding to reject intervention petition which was arguably filed late because "[i]t is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities.").

II. STANDING OF PETITIONERS TO SEEK HEARING

In ruling on a Subpart L request for hearing, a presiding officer is required by Section 2.1205(h) to determine whether a petitioner meets the judicial standards for standing and to consider, among other factors: (1) the nature of the petitioner's right under the Atomic Energy Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding upon the petitioner's interest. Under Commission case law applying judicial concepts of standing, to establish the requisite interest to intervene in a proceeding, a petitioner "must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). And while the petitioner bears the burden of demonstrating standing, the petition or hearing request is to be construed in the petitioner's favor. See id.

Under NRC jurisprudence, a petitioner may be presumed in some instances to have fulfilled the judicial standards of standing based on the petitioner's geographical proximity to a facility or source of radioactivity. See Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 note 22 (1994). The Commission has held that in materials licensing cases (in contrast to reactor licensing proceedings), proximity alone is not sufficient to establish standing. See International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 note 1 (1998).

Rather, a presumption of standing based on geographical proximity may be applied in materials cases only when the activity at issue involves a "significant source of radioactivity producing an obvious potential for offsite consequences." Sequoyah Fuels, CLI-94-12, 40 NRC at 75 note 22 (citing Armed Forces Radiobiology Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982); and Northern States Power Co. (Pathfinder Atomic Plant),

LBP-90-3, 31 NRC 40, 45 (1990) (emphasis added)). How close a petitioner must live to the source for this "proximity plus" presumption to come into play "depends on the danger posed by the source at issue." Id.

In the matter before us, each of the 25 named petitioners resides in Quakertown, with the individuals closest to the CFC facility living approximately one-third of a mile (1,700 feet) away and the farthest living approximately three miles (16,100 feet) away.[9] Relying on the Appeal Board's Armed Forces ruling, Petitioners contend they have standing per se because they live in close enough proximity to the facility to have their health, safety, and property threatened. See Petitioners' Reply to CFC Response at 10-13 (citing Armed Forces Radiobiology Research Institute, (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150 (1982)).

For the Company's part, its written responses prior to the oral argument opposed the standing of all 25 petitioners. See CFC Response to Hearing Request at 9-15; CFC Response to Petitioners' Reply at 13-27. In contesting Petitioners' claim to have standing per se, CFC maintains that Armed Forces is not controlling here in light of subsequent rulemaking proceedings and Commission decisions holding that proximity alone is not sufficient to demonstrate standing in materials licensing cases. See CFC Response to Petitioners' Reply at 16-17. Thus, while the Company concedes that the one million curies it would possess under the license is a "significant source of radioactivity," see Tr. at 145, it asserts that Petitioners cannot avail themselves of what we call the "proximity-plus presumption" because they failed to allege a viable potential pathway for a release of radiation from the cobalt-60 sealed source. See CFC Response to Petitioners' Reply at 18.[10]

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[9] See Location of Residents Signing Affidavits and accompanying Table and affidavits (Aug. 14, 2003). The Company has not challenged any of the distances provided by Petitioners.

[10] At the September 10 oral argument, however, the Company conceded that Petitioners may have standing to raise security concerns related to terrorist activities. See Tr. at 172.

Given the import to materials licensing cases of the language in the Commission's Sequoyah Fuels decision establishing the governing test, i.e., a "significant source of radioactivity producing an obvious potential for offsite consequences," we asked the Staff on two occasions to address the meaning and applicability of that test in the context of this proceeding. In its initial brief, the Staff supported Petitioners' standing based on the traditional judicial standards of standing, i.e., injury-in-fact, traceability, and redressability.[11]

It was unclear from its subsequent filing addressing the Sequoyah Fuels test, however, whether the Staff supported Petitioners' standing based on the proximity-plus presumption. In that September 3 response, the Staff asserted that while the amount of cobalt-60 authorized for use at the CFC irradiation facility -- up to one million curies -- represented a significant source of radioactivity, there was no obvious potential for offsite consequences because of the passive nature of the facility's protective systems.[12] At the oral argument, the Staff initially supported Petitioners' claim of standing based on both theories, see Tr. at 127, but then later appeared to take a position of supporting standing based only on the proximity theory, compare id. at 139.

In any event, it is acknowledged by all litigants that the cobalt-60 inventory the Company has been authorized to use at its facility is a "significant source of radioactivity" for purposes of the Commission's Sequoyah Fuels test. Accordingly, it appears the central issue to be resolved is whether that source produces an "obvious potential for offsite consequences."

At the outset, we point out an important distinction between what petitioners must show to avail themselves of the proximity-plus presumption in materials cases and what they must show under the judicial standards of standing. If Petitioners wish to base their standing on their

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[11] See NRC Staff Brief on Standing and Areas of Concern (Aug. 27, 2003)[hereinafter Staff Brief] at 3-4.

[12] See NRC Staff Answer to Presiding Officer's Question on Whether Facility Constitutes a Significant Source with Obvious Potential for Off-site Consequences (Sept. 3, 2003) at 1-3.

geographical proximity to the facility, they are not required to prove causation or traceability;[13] but they must nonetheless demonstrate that the CFC cobalt-60 inventory presents an obvious potential for offsite consequences. On this point, we find the Commission's Georgia Tech decision particularly instructive.

Although Georgia Tech involved an application for a renewal license of a research reactor rather than an application for a materials license for an irradiator, the Commission applied the Sequoyah Fuels test for materials licensing proceedings to the nonpower reactor before it. See Georgia Tech, CLI-95-12, 42 NRC at 116. In upholding the Licensing Board's grant of standing to the petitioner, the Commission in that case declined to disturb the Board's finding that it was "neither 'extravagant' nor 'a stretch of the imagination' to presume that some injury, 'which wouldn't have to be very great,' could occur within ½ mile of the research reactor." Id. at 117. Notwithstanding the University's assertion that any hypothetical scenarios involving the dispersion of noble gases during a reactor core meltdown were "incredible" because they would require the combined failure of "three independent redundant safety systems," the Board found that such a combined failure did not "altogether strain[] credibility." Id.

Applying that Georgia Tech reasoning to the matter before us, we conclude -- at this preliminary stage of the proceeding -- that here too it would be neither "extravagant" nor "a stretch of the imagination" to presume that some injury to neighbors could occur within the vicinity of the CFC irradiation facility. Just as it was possible to imagine a plausible scenario, albeit a highly unlikely one, in which three independent redundant safety systems -- all designed to function perfectly under normal circumstances -- could simultaneously fail in a research reactor, it is equally possible to envision an equally unlikely, yet plausible, scenario in which an

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[13] See Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979) (petitioner relieved of having to demonstrate causation if the proximity presumption applies).

accident of some sort could damage the armored pool containing the cobalt-60 at the CFC facility. Even the Company appeared to acknowledge that what it would call a very strained accident scenario could result in the dispersion of radioactive material into (or the transmission of gamma radiation through) the air (see Tr. at 153);[14] we can also visualize a sequence of failures whereby radioactive particles could enter the water, escape a defective or damaged pool (see p. 23, below), and affect the surroundings.

We recognize, as did the Appeal Board in Armed Forces, that further analysis on the merits may reveal that there is, in fact, no credible pathway through which radiation from the CFC source could be released to the public. See ALAB-682, 16 NRC at 155. But we cannot say definitively at this threshold standing stage that by no "stretch of the imagination" could such exposure possibly occur. See Georgia Tech, CLI-95-12, 42 NRC at 117. Accordingly, we find that the cobalt-60 inventory which the license would authorize the Company to possess would be a significant source of radioactivity that produces an obvious potential for offsite consequences. On that basis, we hold that it is appropriate to make the "proximity-plus presumption" available in this proceeding.

Having found that that presumption may be employed here, we next consider whether any or all of the 25 named petitioners may indeed base their standing on that presumption, i.e., whether their homes are located close enough to the CFC facility for that purpose. The requisite distance, as the Commission observed in Sequoyah Fuels, "depends on the danger posed by the source at issue." CLI-94-12, 40 NRC at 75 note 22.

For further guidance on this point, we turn to the Appeal Board's Armed Forces decision, over which there was considerable disagreement between the Company and Petitioners regarding its applicability to the instant proceeding. At issue in Armed Forces was

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[14] Although the transcript attributes this statement to the Presiding Officer, it was actually spoken by Mr. Thompson, counsel for CFC.

the renewal of a Part 30 byproduct materials license that authorized the applicant to possess up to 320,000 curies of cobalt-60 in a water-shielded irradiation facility. See ALAB-682, 16 NRC at 150. The Appeal Board there reversed the Licensing Board's decision denying the petitioner organization standing to intervene. In finding that the organization's standing did exist, the Appeal Board disagreed with the Licensing Board's determination that the petitioner -- some of whose members lived within three to five miles of the facility -- was required to show specifically how the radiation would be released from the facility to the public. See id. at 152, 153.

In addition, we note that, although the Appeal Board did discuss at some length its earlier North Anna opinion, in which it had held that in a reactor licensing proceeding proximity alone was sufficient to establish the requisite interest,[15] it also made much of the size of the cobalt-60 inventory at the Armed Forces facility, referring to it as a "substantial source of radioactive material." See Armed Forces, ALAB-682, 16 NRC at 154. In that connection, the Appeal Board further noted that at least one member of the petitioner's organization lived as close as three miles from the 320,000-curie source (then described as being one of the largest cobalt-60 inventories in the country), and that "[t]his proximity to a large source of radioactive material establishes petitioner's interest." Id.

Thus, as we see it, the Appeal Board reversed the Licensing Board's finding, not solely on the basis of the member's proximity to the facility, but rather, on the basis of the member's proximity to such a "substantial source" of radioactive material. Our reading of Armed Forces -- and its continued validity -- is confirmed by more recent Commission decisions on point, including Sequoyah Fuels and Georgia Tech, both of which cite Armed Forces with approval.[16]

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[15] See North Anna, ALAB-522, 9 NRC at 56.

[16] See Sequoyah Fuels, CLI-94-12, 40 NRC at 75 note 22; Georgia Tech, CLI-95-12, 42 NRC at 116, 117.

In addition to asserting that Armed Forces is not controlling in this proceeding, the Company attempts to distinguish it factually from the instant case by arguing (1) that the Armed Forces facility was merely a cobalt-60 storage facility, rather than an irradiation facility,[17] and (2) that the Armed Forces facility used a panoramic source that exposed the cobalt to the air, rather than an underwater source.[18] Clearly, the Company's first argument is not accurate. See Armed Forces, ALAB-682, 16 NRC at 152. And although the Company is correct that the Armed Forces facility operated in different fashion, the difference in design -- even if CFC's underwater design is "better" -- does not preclude either the Commission's Georgia Tech "stretch of the imagination" rationale from applying here or the Appeal Board's Armed Forces decision from providing valuable guidance for our purposes.

On that score, three Petitioners in the proceeding before us, namely, Andrew Ford, Tom Helt, and Kelly Helt, live approximately one-third of a mile from the CFC facility. In contrast, the closest petitioner in Armed Forces lived nine times farther from that facility. The CFC facility would be licensed to hold up to one million curies of cobalt-60, over three times more than the Armed Forces inventory. When we combine these distance and source factors, the above-named Petitioners before us are seen -- for standing purposes -- to be significantly more susceptible to being affected by the CFC facility than were the Armed Forces petitioners by that facility. To be sure, there may be improvements in the CFC facility design over that of the Armed Forces facility that may reduce that susceptibility somewhat. But this is of insufficient moment -- for we have already indicated it is possible to visualize pathways for the nearest CFC petitioners actually to be affected (see pp. 10-11, above), and we thus find that at least these three petitioners have demonstrated their standing to intervene in this proceeding.

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[17] See CFC Response to Hearing Request at 11 note 12.

[18] See Tr. at 156; see also CFC Logistics, Inc.'s Supplement to the Presiding Officer's Questions at Oral Argument (Oct. 7, 2003) at 1-2.

In the course of establishing their standing, these petitioners have also provided information showing that the other factors weighing on the grant or denial of a hearing request (see p. 7, above) support their participation. It would add nothing to this opinion to belabor those obvious points.

Our finding that at least some of the Petitioners have standing enables us to move on to the next step in ruling on the hearing request, i.e., the germaneness of their concerns. As a practical matter, then, because the matter can move forward based on the standing of the three, we need not decide at this time whether all the Petitioners have standing.

There is a further reason not to rule on the standing of all the Petitioners. Because the Staff did not previously issue a formal notice of hearing, the NRC Rules of Practice (Section 2.1205(j)) require us now to publish a formal notice of hearing in the Federal Register. This could lead to additional persons or entities with affected interests filing petitions to intervene in this proceeding. In light of the possibility that additional individual parties or organizations may later seek to join,[19] we think that rather than ruling on the standing of all current Petitioners at this time, it is more sensible to await further developments. Accordingly, we now move forward to considering the "germaneness" of the "areas of concern" that these petitioners presented.

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[19] The Rules do permit us, in managing the hearing process, to take steps "in the interest of avoiding repetitive factual presentations and arguments." 10 C.F.R. §§ 2.1205(n), 2.1209. These could include, for example, consolidating presentations by petitioners/ intervenors having similar concerns.

III. GERMANENESS OF PETITIONERS' CONCERNS

Having determined that at least some of the Petitioners have the requisite standing to pursue a request for a hearing before us, we must analyze the "areas of concern" they have presented to determine whether they are "germane" to the matter before us and thus can be the trigger for a hearing. Before turning to the particulars of the concerns presented, we pause to set out our understanding of the "germaneness" test.

A. The Applicable Standards. Even cursory examination of the Subpart L Rules makes clear that they set out a relatively simple process for triggering informal hearings on matters such as the materials license we have before us. For a Subpart L proceeding like this one, all that is required is to demonstrate that an "area of concern" is "germane." See 10 C.F.R. § 2.1205(h). NRC jurisprudence confirms the existence and sets out the workings of that relatively simple "germaneness" standard, and explains why that standard is appropriate.

The minimal pleading standard a hearing requestor must meet is perhaps best understood in terms of the corresponding level of burden placed on an applicant/licensee to respond when a Subpart L hearing is triggered. For example, triggering a Subpart L hearing does not lead to prehearing discovery -- for none is permitted. 10 C.F.R. § 2.1231(d). Nor does it require preparing to present or to cross-examine live witnesses -- for no live trial is mandated. See 10 C.F.R. § 2.1233 (compare 10 C.F.R. § 2.1235). Instead, the applicant/licensee may need only eventually to prepare a written testimonial response to whatever written testimony is later submitted by the petiitoner/intervenor (see 10 C.F.R. § 2.1233(a), regarding sequencing of presentations).

In practice, efforts to avoid even that level of burden to respond have not been easy to sustain. For example, in International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-06, 55 NRC 147 (2002), the Presiding Officer noted that, in opposing a hearing, the licensee was "vigorously insist[ing]" that the petitioner's "concerns are not well founded." Id. at 151. The Presiding Officer conceded (ibid.) the following:

> That position may well ultimately be upheld. Further exploration of the matter may indeed produce the necessary conclusion that, in point of fact and contrary to [petitioner's] claim, [the propounded concern] does not pose a real threat to [petitioner's] health and well-being . . . .

Nonetheless, he went on to hold (id. at 151-52) that

> That consideration is, however, of no present moment. As the terms of section 2.1[2]05(e) and (h) make clear, at this seminal stage of an informal Subpart L proceeding, it is enough that the hearing requestor has set forth with sufficient particularity one or more germane areas of concern . . . . Whether the concern(s) advanced are also meritorious is for later determination. See 10 C.F.R. § 2.1233. (emphasis added, footnote omitted).

In a more recent proceeding, the same Presiding Officer (Judge Rosenthal) elaborated on his earlier rationale:

> Not surprisingly . . . the Licensee does not regard any of the claims to be meritorious. And it might well turn out that, in fact, none of them has substance. But, to reiterate what was said in LBP-00-9, that consideration is entirely irrelevant at this stage of the proceeding. It is enough that a hearing requestor present at least one area of concern that bears upon the matter at hand . . . leaving the question of the justification for that concern to the hearing stage. (emphasis added).

U. S. Army (Jefferson Proving Ground Site), LBP-03-02, 57 NRC 39, 42 (2003).

In affirming the White Mesa decision that the petitioners "have standing, have asserted a germane area of concern, and can proceed to hearing," the Commission addressed the licensee's "claims that the Presiding Officer accepted [petitioner's] areas of concern without analyzing how detailed, 'concrete[],' or 'particulari[zed]' those concerns were." CLI-02-10, 55 NRC 251, 252, 257 (2002). Rejecting those claims, the Commission held that the conclusion below that petitioner had "set forth with particularity one or more germane areas of concern" was "plainly . . . reasonable" because those "concerns on their face relate to the subject matter of the license amendment at issue . . . ." (Id. at 257, emphasis added).

Going on, the Commission held that a statement of concerns "need not be extensive, but [need only be] sufficient to establish that the issues the requester wants to raise regarding

the licensing action fall generally within the range of matters that properly are subject to challenge in such a proceeding." (Ibid., emphasis in original). As the Commission saw it, the purpose of presenting areas of concern is simply to "provide the Presiding Officer with the minimal information needed to ensure the intervenor desires to litigate issues germane to the licensing proceeding and therefore should be allowed to take the additional step of making a full written presentation under § 2.1233." (Ibid., emphasis in original).

In another proceeding, the Commission rejected a licensee's claims that the petitioner's "hearing request is so vague and so broad as to potentially cover all questions under review by the NRC staff," such that "the Presiding Officer could not have made a proper determination that these areas of concern were actually germane." Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 16 (2001). In support of this argument, the licensee had objected to the Presiding Officer's alleged laxity in allowing the parties to delay "identify[ing] 'issues for litigation' [until] prior to the hearing." Id. at 16. In this regard, the licensee thought that the Presiding Officer should not, "while finding several broad areas of concern to be germane," have "also stated that 'specific issues' may be further 'particularized' prior to the hearing." Ibid. As the Commission put it, the licensee was arguing "that if it is necessary for [petitioner] to narrow its concerns prior to the hearing, they must not be specific enough to trigger a hearing." Ibid.

In response, the Commission -- noting that the Presiding Officer had "examined each of [petitioner's] concerns carefully, accepting some and rejecting others" -- held (ibid.) that he

> rightly did not insist on comprehensive pleading or extrinsic support, for Subpart L itself does not. Compare 10 C.F.R. § 2.1205(e)(3) with 10 C.F.R. §§ 2.714(b)(2) (Subpart G). Under Subpart L, the intervenor's pleading burden is modest. The would-be intervenor must only state his areas of concern with enough specificity so that the Presiding Officer may determine whether the concerns are truly relevant -- i.e., 'germane' -- to the license amendment at issue. See, e.g., Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 52 (1994);

> International Uranium (USA) Corporation (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 NRC 137, 142-43 (1998)(emphasis added).

As additional justification for so holding, the Commission explained (ibid.) that an

> intervenor cannot be expected to substantiate its concerns exhaustively before it has access to the hearing file: 'It would not be equitable to require an intervenor to file its written presentation setting forth all its concerns without access to the hearing file. Of course, the intervenor is required to identify the areas of concern it wishes to raise in the proceeding, which will provide the presiding officer with the minimal information needed to ensure the intervenor desires to litigate issues germane to the licensing proceeding . . . .' Statement of Consideration, 'Informal Hearing Procedures for Materials Licensing Adjudication,' 54 Fed. Reg. 8,272 (Feb. 28, 1989).

Similarly, the Commission rejected (id. at 17) the licensee's

> argument that the Presiding Officer improperly deferred the requirement for [petitioner] to further specify its areas of concern until the prehearing conference. The applicable regulations authorize the Presiding Officer to order the parties to narrow the issues prior to the hearing. See 10 C.F.R. §2.1209(c). As this is specifically authorized in the regulations, it does not amount to a concession that [petitioner's] original concerns were stated with insufficient specificity.

The upshot was a holding that "the Presiding Officer properly permitted [petitioner] to move forward with its case" (ibid.), and further confirmation that it is indeed a very limited threshold pleading obligation that is imposed upon a Subpart L hearing requester.

Put simply, then, the Commission has made it clear that what is in issue now under that threshold obligation is not whether petitioners have put forward comprehensive pleading of, or demonstrated extrinsic support for, their areas of concern; rather, the issue is only whether they have pointed to relevant areas specifically enough to be permitted to move forward toward a written presentation of their supporting evidence.[20] In the next section, we apply this test to the areas of concern they presented, which were grouped in seven overall categories

[20] We do not understand what the Commission had to say just the other day, on an analogous subject in a Subpart G case, to detract from what it has previously held about Subpart L's minimal pleading requirements. See Dominion Nuclear Connecticut (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC ___, ___ (slip op. at 8, 16)(Oct. 23, 2003).

containing some 16 specific concerns, seven of which the NRC Staff argued were legitimate subjects for hearing but all of which the Company argued were not germane.[21]

Before turning to those questions, we address three overarching -- but misdirected -- arguments that appear to underlie the Company's position that we cannot entertain any of the areas of concern propounded by Petitioners.[22] The first is straightforward: the Company frequently appeared to rely upon its view -- based on its belief that its facility is quite well-designed -- that each area of concern can be shown to be non-meritorious. As is clear from the foregoing, however, that is a test for another day. For now, all that we need determine is whether the area of concern is relevant to the license application being considered, and is subject to being addressed in this proceeding.

The Company's second general argument is a variation of the first. The Company points to Part 36 of the agency's regulations and argues that those regulations embody rejection of the points the Petitioners are raising. This argument misconstrues the role of regulations in a proceeding before us. To be sure, the regulations set the standards that must be applied to a facility like CFC's, but they do not embody a determination that the facility meets those standards. That the Company believes that its facility complies with those regulations, and that it has the Staff's endorsement of that view, does not remove the issue from our purview. See notes 1, above, and 32, below.

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[21] As we noted above (p. 2), the litigants filed a number of early, somewhat diffuse pleadings. On August 7, we directed them to file additional pleadings that would better focus the issues. In framing this decision, we have drawn upon the arguments the litigants made in those additional pleadings (looking specifically at the areas of concern as re-stated by the petitioners on August 14, and at the responses thereto filed on August 27 and September 5 by the NRC Staff and by the Company, respectively) and at the September 10 oral argument. The germaneness of matters presented in later pleadings, involving amended or supplemental concerns, will be addressed at future prehearing conferences (see pp. 29-30, below).

[22] See, generally, CFC Logistics, Inc.'s Response to NRC Staff's Brief on Standing and Petitioners' Areas of Concern (Sept. 5, 2003) [hereinafter CFC Response to Staff Brief], at 27-50.

Nor does the Company prevail by conflating the concepts of germaneness and standing. That is, in some instances the Company seems to assert that a concern cannot be germane unless the Petitioners have shown a clear radiological pathway for that concern to have an impact upon them. But where the issue of standing has already been settled in Petitioners' favor by allowing them to rely upon the proximity-plus presumption, there is no requirement that Petitioners re-establish or particularize their standing as to each stated concern, so long as that concern bears upon the specific status (for example, "neighbor") upon which their overall standing is based.

The Company's final generalized argument is a two-step one: that Petitioners can raise only those concerns that deal with threats that go "above and beyond previously approved activities," and that the Part 36 regulations approve what the Company is doing. See, e.g., CFC Response to Staff Brief at 15; see also id. at 14, 27. We have already seen that reliance upon the regulations for this purpose is misplaced. More importantly, the "previously approved" premise involves a misreading of the White Mesa holdings, which are the only authority cited (id. at 15) to provide justification for the remarkable principle the Company is attempting to induce us to adopt. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-0219, 56 NRC 113 (2002).

Insofar as is relevant here, White Mesa involved not an initial license but a series of license amendments sought by a uranium reprocessor. In passing on amendments under which the reprocessor sought to acquire new uranium streams, both the Presiding Officer and the Commission held repeatedly that the only matter about the pending license amendment subject to challenge was the new waste stream, not the "previously approved" underlying operation itself or any of the "previously approved" waste streams.[23] CLI-01-21, 54 NRC 247,

[23] See also the colloquy on this subject at the oral argument (Tr. at 207-09).

251 (2001)("a petitioner's challenge must show that the amendment will cause a ' "distinct new harm or threat" apart from the activities already licensed,' " citing CLI-01-18, 54 NRC 27 (2001); see also LBP-02-06, 55 NRC 147, 151 (2002)(directing that a hearing be held because the new material for reprocessing cannot "be equated with material previously received and processed by the Mill.")

In other words, all White Mesa stands for in our context is that in a license amendment proceeding, the underlying nature of the business or of activities that previously won approval in the licensing process cannot be re-opened; rather, only the incremental impact of the activity that is the subject of the amendment can be challenged. Put another way, it seems abundantly clear that the Commission's and the Presiding Officer's use of "previously approved" in that context involved an underlying license, or a prior license amendment, that had already been subject to the NRC hearing process and had passed muster, either because no hearing was sought or granted, or because the reprocessor prevailed on the merits of a hearing. The adjudicators were simply, and unremarkably, refusing to permit a re-trial of matters previously litigated.

The Company's attempt here to stretch that holding -- so as to call its proposal "previously approved" to the extent there exist general regulations against which the NRC Staff has measured that proposal -- ignores that, in sharp contrast to the White Mesa situation, the initial license proposal before us has not yet been tested against those regulations in the hearing process. Nothing about the Company's proposal, then, can be regarded as "previously approved" within the meaning of the White Mesa line of cases.

The Petitioners' Concerns. Applying the proper standard, and putting aside the Company's overall arguments that we have found unavailing, we need provide only abbreviated additional reasoning to reach the following conclusions as to each of the areas of concern

presented.[24] Because the Petitioners encountered some difficulty in obtaining documents in timely fashion for review by their expert advisor (see LBP-03-16, 58 NRC at __, note 13), we have construed their pleadings liberally. In those pleadings, the Petitioners furnished for each concern a statement of (1) the "event" of concern; (2) the projected "impact" of that event; (3) "substantiation" in terms of a chain of causation that could be a trigger for, or the result of, the event in question; and (4) a "source" in terms of scientific literature or expert opinion. We also do not perceive a need for present purposes to recap the content of either the Petitioners' pleadings or the Company's and the Staff's responses.

1. "Air Dispersion." Petitioners advanced seven specific concerns related to their overall concern about inadequate planning "to assure against air dispersion," presumably of radioactive material or gamma radiation.

1.1.[25] Vessel Cracking. In the circumstances of late document disclosure, we read this concern about cracking of "the vessel containing the cobalt-60" from "loss of coolant" as fairly embracing a concern about an accident -- for example, one caused by dropping a heavy weight (such as a transfer cask) while it is suspended above the pool -- damaging the structure of the pool holding the water in which the cobalt-60 sources would sit, possibly

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[24] There is more than a suggestion in a number of NRC precedents discussed above that we need only find one or more concerns to be germane to trigger a hearing, and thus need not address at this stage all of those that are pending. Given that an immediate appeal by the Company is permissible, however (see p. 33, below), and given the extent of the review we previously undertook in resolving the stay motion issues, we think it more prudent here to cover all, or at least most of, the concerns, lest a Commission reversal on the one concern discussed leave the ultimate result -- that a hearing is in order -- subject to repetitive re-evaluation as additional concerns are discussed seriatim. On the other hand, we think it not a good use of our resources at this stage -- in light of the modest test the petitioners must meet and the stricture to avoid premature discussion of the merits -- to address each of the concerns in great detail. Compare Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), LBP-99-46, 50 NRC 386, 396-406 (1999) with Molycorp, Inc. (Washington, Pennsylvania), LBP-00-10, 51 NRC 163, 171-75 (2000).

[25] Misnumbered "1.2" in August 14 pleading.

releasing the pool water into the ground and thus affecting the surroundings (while also losing the pool water's capacity to shield the surroundings from the sources' gamma radiation). That the Company believes this scenario far-fetched (and thus defeatable on the merits) does not make it non-germane. The NRC Staff believes it germane, and we agree.[26]

1.2. Air Circulation. This concern is about radiation being emitted into the "air circulati[ng] around the vessel containing the cobalt-60" and thus being transported into surrounding neighborhoods. The cobalt-60 sources would sit inside a plenum immersed in a pool of water, with the only air circulation within the plenum itself. As framed, this concern about air circulation is not applicable or relevant to an underwater irradiator and thus cannot be considered germane, notwithstanding the Staff's willingness to agree that it is.

1.3. Radioactive Waste. This concern is about radiation emission from "storage of radioactive waste at the facility." Although the Company urges that no waste as such will be "stored" there, the concern is framed broadly enough to cover emissions from materials collected periodically during "water chemistry controls," which will take place as part of the facility's operation. As so understood, the concern is germane, as the Staff agrees.

1.4. Rod Mishandling. Concern about the mishandling of the cobalt-60 sources during transportation, loading and removal is plainly germane, as the Staff agrees. The Company's arguments to the contrary are entirely merits-based and thus not cognizable at this juncture.[27]

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[26] For the Staff's views on each of the areas of concern, see Staff Brief at 5-11.

[27] We should note that our earlier ruling on the stay motion required us to take the standard look at whether the Petitioners had carried the heavy burden of demonstrating "probability of success on the merits" and "irreparable injury." As we indicated then (LBP-03-16, 58 NRC at __ (slip op. at 11-12, 15)), no conclusions we reached there against the Petitioners are determinative on the questions now before us, dealing with whether they have carried the less rigorous burden of demonstrating "germaneness."

1.5. Electricity Loss. In expressing concern about a loss of power, the Petitioners mistakenly refer to “a bell containing cobalt-60" being stuck underwater with damaging consequences. As they learned thereafter, including during the facility visit the day of oral argument, the immersible bells contain only the food and other products to be irradiated, while the cobalt-60 sources remain at the bottom of the pool. The Company argues that the specific problem is thus not applicable or relevant to the application for this irradiator. But there are other problems that could stem from the concern about loss of facility electricity, and on this basis we find that broad concern germane (as does the Staff), subject to its being stated more specifically at the proper juncture (see p. 18, above, citing the Commission’s reliance, in Sequyoah Fuels, on 10 C.F.R. § 2.1209(c) conferences to specify and narrow the issues).

1.6 Air-Line Damage. We discussed in LBP-03-16 the role of the air lines, both of which are subject to damage. 58 NRC at ___ (slip op. at 13). Although we there accepted the Company’s arguments about the lack of sufficient showing of probability of success on the merits or of irreparable injury, that is not the test here (see note 27, above), and we agree with the Staff that concerns about damaged air lines are germane.

1.7. Ozone Dispersion. As the Company points out, ozone generation is a characteristic of panoramic irradiators, in which the source operates in air and can thus convert oxygen to ozone. This is not the case with an underwater irradiator, and thus this concern is not germane, being inapplicable or irrelevant to the application under consideration.

1.8. Untried Installation/Assembly. The Company believes its design is state-of-the-art and thus should present less concern to nearby residents than older designs. The Petitioners see the converse: an untried design. Although this concern is lacking in particulars, Petitioners point to the difficulty and delay they encountered in obtaining trade secret material -- a view we have already indicated we share (see LBP–03-16, 58 NRC at note 13) -- that they needed to review in order to be more precise in their pleadings. On that basis, we are unwilling

at this juncture to find this concern lacking in germaneness. We note, however, that a challenge to the facility design as untried or untested, uncoupled with a claim that the design fails to meet the applicable regulations, might be viewed as an impermissible collateral attack on NRC regulations. 10 C.F.R. § 2.1239. If so, it would not be within our jurisdiction to entertain, and accordingly would not be germane to the proceeding before us. In any event, to the extent this matter does move forward, it should be combined with concern 6, below.

2. "Neighbors' Security." Under this general heading, Petitioners advance two specific concerns.

2.1. [Untitled]. To the extent this concern puts forward an overly-generalized claim of "inadequate regulation," it seems to present a challenge to the Commission's regulations that may not be entertained in our proceedings. 10 C.F.R. § 2.1239. Accordingly, this concern is not germane to any issues that can be addressed, or to any relief that can be granted, in this proceeding. To the extent, however, that this concern mentions security planning, it is germane, but should be combined with 2.2 and 5.2, below.

2.2. Security Plan Inadequacy. Notwithstanding the opposition of the Company, this concern, on which the Staff is willing to defer judgment, is plainly germane. The lack of specificity accompanying it was due to the Petitioners' inability to obtain the relevant documents -- which were being withheld under various and changing claims of secrecy -- in timely fashion. As with concern 2.1, above, this concern should be combined with 5.2, below, whose precise contours remain to be defined (see p. 26, below, and LBP-03-16, 58 NRC at __ (slip op. at 12)).

3. Worker Exposure. Under this general area, Petitioners present a single specific concern (numbered 3.1) about the potential for worker exposure to radiation. In apparent recognition, however, that nearby residents may lack standing to raise concerns about worker health and safety, Petitioners specify a concern about a worker becoming contaminated with radioactive particles that later contaminate neighboring people and structures. Given that the

concern as stated provides "substantiation" only by reference to cesium-137 sources, we are constrained to accept the Company's and the Staff's arguments and to find it non-germane as to the doubly-encapsulated cobalt-60 sources that are the subject of this application.

4. Neighbors' Water. Petitioners express concern over possible cobalt-60 contamination of the public water system, particularly in light of the alleged closeness of the local water table to the surface. At oral argument, they expressed concern that the largely underground pool could be damaged in some kind of accident, releasing its (possibly contaminated) water into the water table, thus contaminating local wells. And in their pleadings they referred to prior incidents in which contaminated pool water was introduced into the public sewer system. The Company's and the Staff's protestations that such accidents and incidents elsewhere are not credible given the facility's design go to the merits, not to the germaneness, of the concerns, and we will therefore allow them to be considered.

5. Transportation Hazards. In expressing their concern about the hazards associated with transporting the cobalt-60 sources, Petitioners have focused on both accidental and deliberate causes.

5.1. Accidents. Petitioners note the absence in the application of emergency procedures for responding to loading and unloading accidents. The Company's and Staff's objection that the concern is stated in generalized fashion is not adequate to defeat the obvious germaneness of this concern, particularly in light of the difficulties and delays encountered by Petitioners in obtaining documents related to the application.

5.2. Sabotage or Terrorism. As indicated in 2.2 above, this concern is germane and the two should be addressed together.

6. Experimental Design. Although the Staff did not agree that the similar concern already discussed in 1.8 above was germane, it does concede that the Petitioners' concern that

this irradiator is "atypical, . . .experimental and unprecedented" is sufficiently germane. We agree with the Staff here and will direct that the two concerns be considered together.

7. General. Under this heading, the Petitioners express a concern about the sufficiency of the decommissioning bond and the absence of a decommissioning plan. The latter concern is clearly factually germane, but the Staff argues that the former is "legally inapplicable" to this facility in that the amount of the bond -- $75,000 -- is pre-ordained by existing regulations. With this concern otherwise germane, we believe that the resolution of whether the matter is precluded by Commission regulation may properly be deferred for now. Before ruling on whether the matter of bond adequacy is precluded from consideration in this proceeding by 10 C.F.R. § 2.1239(a),[28] we will want the parties to address the significance, if any, of (1) the apparently multi-million dollar cost recently incurred under NRC and Environmental Protection Agency auspices to remediate a site elsewhere in the Commonwealth on which was located an abandoned cobalt-60 irradiator, [29] and (2) an apparently impending NRC rule change regarding the size of decommissioning bonds. [30]

As has been seen, a number of the areas of concern presented by the Petitioners are germane to the Company's application and to the outcome of this proceeding.[31] That being so,

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[28] See also 10 C.F.R. § 2.1239(b).

[29] See "Radioactive Material Removed from Bankrupt Central Pa. Site," NRC News Release, September 29, 2003, and the related September 29 news release issued by the Pennsylvania Department of Environmental Protection.

[30] See "NRC Proposes Changes to Regulations on Decommissioning Funding," NRC News Release, September 27, 2002, and Proposed Rule, 67 Fed. Reg. 62,403 (Oct. 7, 2002).

[31] To recap, we find the *germane* areas of concern to be as follows: 1.1 (pool cracking); 1.3 (waste collection); 1.4 (rod mishandling); 1.5 (electricity loss); 1.6 (air-line damage); 1.8 and 6 (untested design); 2.1, 2.2, and 5.2 (security planning); 4 (neighbors' water); 5.1 (transportation accidents); and 7 (decommissioning bond/plan). The *non-germane* areas are: 1.2 (air circulation); 1.7 (ozone dispersion); 2.1 (inadequate regulation); and 3 (worker exposure).

it will be necessary to hold a hearing to address those concerns and to determine whether the facility can maintain its license and, if so, under what conditions.[32]

Under Subpart L, that hearing will, at least initially, be based on written presentations only.[33] In its responses to whatever written material the Petitioners may present to support their concerns,[34] the Company will have full opportunity to put forward its various arguments that those concerns lack merit, arguments we have held were premature at this stage.[35] In the next portion of this opinion, we discuss briefly the path we will follow to get to that hearing.

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[32] As we pointed out on September 23 -- when we denied the Petitioners' motion to block the facility's receipt of the radioactive sources -- the receipt of those sources, and any other steps taken under the license, are at the Company's risk pending the outcome of this proceeding, in which the license application will be evaluated and the awarded license could be invalidated. LBP-03-16, 58 NRC at ___ (slip op. at 15).

[33] See 10 C.F.R. § 2.1233, first sentence. But see id., second sentence, and §§ 2.1209(h) and 2.1235(a), providing the Presiding Officer the authority not only to present questions to be addressed in writing but, if need be, to summon particular witnesses to appear in person to respond to oral questions.

[34] As indicated above, the Petitioners pointed to some 16 "areas of concern" to justify their hearing request. 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)). Each of the five areas emphasized in the stay motion has now been found to be germane.

[35] The Staff's original election not to participate in the proceeding having been reinstated (see LBP-03-16, 58 NRC at __ (slip op. at 16)), the hearing will, barring further developments, involve only the Company and the Petitioners. It is likely, however, that we will consider directing the Staff to participate as to the legal issues and the factual aspects related to both the security and the decommissioning concerns. See 10 C.F.R. § 2.1213, last sentence, and note 42, below.

IV. FURTHER PROCEEDINGS AND SETTLEMENT DISCUSSIONS

How soon the requisite hearing will take place remains to be seen. Because the NRC Staff did not publish a notice of hearing at the outset (see p. 4, above), the Rules of Practice governing materials licenses require us -- having allowed these Petitioners to become parties and having directed that a hearing be held -- now to issue a formal notice of hearing providing 30 days for prospective additional intervenors to file petitions. See 10 C.F.R. § 2.1205(d)(i), (j), (k). A notice to that effect will be published in the Federal Register shortly.

Given the effort that these Petitioners have put into the matter, and our authority under the NRC's Rules of Practice to "condition or limit participation in the interest of avoiding repetitive factual presentations and argument" (10 C.F.R. § 2.1205(n)), it might in some circumstances be permissible, as well as prudent and efficient -- while awaiting responses to that notice from potential new petitioners -- to begin the written presentation process as to the existing Petitioners. Rather than follow that course, however, we think it would be more effective here to embark upon prehearing activities that might well result in a more efficient and focused hearing.

That period will allow the resolution or the handling of matters like the following. As we have indicated, in some respects Petitioners were hampered by their inability to obtain documents associated with the application in a timely fashion. And it is now time for the Staff to prepare the hearing file called for by the Rules (10 C.F.R. § 2.1231). The Petitioners have filed additional papers with us since shortly after the oral argument, seeking various kinds of relief involving acquisition and use of documents, and filing of amended or supplemental statements

of concerns.[36] We intend to use the response period provided by the formal Notice of Hearing, as well as the concurrent period for the Staff to prepare the hearing file, to address all these and any other appropriate matters.

In that regard, although formal discovery is forbidden, the Company elected before the oral argument to provide the Petitioners and the Board (along with the Staff, which is entitled to access to the facility in the course of its regulatory duties) the opportunity to tour its facility. Unfortunately, Petitioners' expert was not available to take advantage of that opportunity. At the Company's option, an additional opportunity for Petitioners' expert to tour the facility might result in greater efficiency in narrowing, reshaping and focusing the issues for hearing.

To that end, we would like to couple such a site visit with a prehearing conference, to be attended not only by counsel but by representatives of the Company and the Petitioners, as well as by their experts, including, if possible, experts from the irradiator manufacturer. The key purposes of the conference will be (1) to clarify and to focus the issues and (2) to resolve -- or to establish a plan for resolving -- any pending requests for relief. If for any reason the Company is unwilling or unable to host a site visit in conjunction with a prehearing conference, or if for any reason the Petitioners object to holding such a conference at what might be perceived as a non-neutral site, we will hold the conference at some nearby location.

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[36] The Rules of Practice make it clear that ours is a "motion practice," and that informal letter or email filings are ordinarily not appropriate. 10 C.F.R. §§ 2.1203 and 2.1237 (incorporating § 2.730). In that regard, we recently advised the parties -- in a e-reply that same morning to an October 16 incoming email message -- "it is now time to insist that all counsel adhere to the formal motion practice set out in the agency's Rules . . . . Otherwise, as has occurred here, communications . . . may not be sufficiently particularized to allow fair evaluation; there is no set mechanism for obtaining the response of opposing counsel; the official NRC docket maintained by the Office of the Secretary will not reflect the filings that are being made; and any Commission or judicial review . . . will be based on an incomplete record." In our upcoming prehearing conference with the parties (see pp. 30-33, below), we will explore how to convert any matters upon which relief is still being sought to formal motions.

We have another purpose in mind for the conference. In promulgating the Rules of Practice which generally govern our proceedings, the Commission included a separate section promoting the value of settling disputes, which we think worth reciting here:

> The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, . . . the fair and reasonable settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all of the parties to those proceedings will take appropriate steps to carry out this purpose.

10 C.F.R. § 2.759 [37] (compare § 2.1241). [38] The Commission did not leave it at that, but reemphasized the point in Rockwell International Corp. (Rocketdyne Division), CLI-90-05, 31 NRC 337, 340 (1990), by noting that "Commission policy strongly favors settlement of adjudicatory proceedings." See also Policy Statement on Alternative Means of Dispute Resolution (57 FR 36678, Aug. 14, 1992).[39]

Certainly, this Commission viewpoint is consistent with the universal notion that reaching consensus is a valuable endeavor. We sense that a lack of communication and a consequent lack of understanding may have contributed to some of the differences among the parties that we have observed. See LBP-03-16, above, 58 NRC at ___, note 19 and accompanying text. Perhaps not all of those differences are amenable to resolution -- indeed, perhaps none of them

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[37] Made applicable to Subpart L by 10 C.F.R. §§ 2.2 and 2.3.

[38] See also 10 C.F.R. § 2.718(h)(Subpart G) and § 2.1209(c) (Subpart L), authorizing the presiding officer to hold settlement conferences.

[39] The Commission's two major policy statements on the conduct of hearings, although directed primarily to other subjects, both encourage attempts to reach settlements. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981), and Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998).

are -- but we will use the conference to explore whether further settlement efforts would be fruitful.[40]

For the reasons expressed herein, we find that at least some of the Petitioners have standing and that some of the "areas of concern" they advanced are germane to this proceeding. Accordingly, their request for an evidentiary hearing is GRANTED. Pursuant to 10 C.F.R. § 2.1231(a), the Staff shall prepare and file the hearing file within 30 days (i.e., by Friday, November 28, 2003), in the manner prescribed by that Rule and in the form prescribed in the margin.[41] We will cause to be published in the Federal Register a Notice providing potential additional intervenors the opportunity to participate in that hearing.

Further proceedings herein will be in accordance with the discussion in Part IV of this opinion. In that regard, the Presiding Officer intends to hold a telephone conference with the

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[40] We recognize that in Rockwell (CLI-90-05, 31 NRC at 340) the Commission endorsed the Appeal Board's placing of restrictions on the Presiding Officer's settlement efforts. In that regard, we will remain conscious of the obvious concerns that arise when a judicial tribunal that will eventually be called upon to decide a matter gets too heavily involved in the merits in the course of settlement discussions. If progress is made, we will be prepared at an early stage to recommend the appointment of a settlement judge, as has been done in other proceedings pursuant to the Commission's Rockwell suggestion (ibid.).

[41] The hearing file shall be chronologically arranged and prefaced with a numbered index of each item therein, which index shall reflect the name (or in lieu thereof a brief indication of the substance) and the date of each item. Each item in the hearing file shall be separated from the other hearing file items by a substantial colored sheet of paper, to which colored sheet shall be attached the numbered tab for the hearing file item that follows it. The hearing file shall be contained in binders that allow for ready inclusion of any supplements to the original material that may later be located. Any subsequent additions to the hearing file shall contain an index and be organized in the same manner as the original.

parties at 2:00 P.M. Eastern Standard Time on Wednesday, November 12, 2003, to discuss setting forth a schedule and directives for the conduct of the proceeding. [42]

Appeal Rights. Pursuant to 10 C.F.R. § 2.1205(o), CFC Logistics may, within ten days of the service of this Memorandum and Order, take an appeal, in the format prescribed, to the Commission on the question whether the hearing request "should have been denied in its entirety." Under that same provision, responses to any such appeal will be due within 15 days thereafter.

It is so ORDERED.

BY THE PRESIDING OFFICER

/RA/

Michael C. Farrar
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 29, 2003

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.

[42] The cover message transmitting the electronic service of this opinion to the parties will contain the information necessary to participate in that planning call. Each of the parties should respond by return email to the Board as to which of its representatives will be participating. Notwithstanding our previous reinstatement of its election not to participate in the proceeding (see LBP-03-16, 58 NRC at __ (slip op. at 16), the NRC Staff is welcome to participate in the call by responding in the same fashion (see note 35, above).

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' REQUEST FOR AN EVIDENTIARY HEARING) (LBP-03-20) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of October 2003