

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

DOCKETED
USNRC

December 1, 2003 (1:45PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	Docket No.: 30-36239-ML
CFC Logistics, Inc.)	ASLBP No.: 03-814-01-ML
(Materials License Application))	Date: November 26, 2003
)	License Control No. 132825

**RESPONSE OF CFC LOGISTICS, INC. TO NRC STAFF'S BRIEF REGARDING
INTERVENORS' FINANCIAL ASSURANCE AREA OF CONCERN**

CFC Logistics, Inc. (CFC Logistics), by its undersigned counsel of record, hereby submits this Response to the Nuclear Regulatory Commission (NRC) Staff's Brief Regarding Intervenor's Financial Assurance Area of Concern regarding CFC Logistics' Byproduct Material License (NRC License) authorizing the operation of a Category III underwater irradiator at its cold-storage facility in Quakertown, Pennsylvania. For the reasons described below, CFC Logistics agrees with the position asserted by NRC Staff in its brief and respectfully requests that the Presiding Officer rule that Intervenor's area of concern regarding financial assurance be barred from consideration in this case as a matter of law.

I. BACKGROUND & ARGUMENT

As a general proposition, NRC regulations are not subject to challenge in a Subpart L "informal" hearing. NRC Staff correctly cites 10 CFR § 2.1239(a) which states, in pertinent part, "any regulation of the Commission issued in its program for the

licensing and regulation of...byproduct material may not be challenged in any adjudication under this subpart [Subpart L]." This regulation's provisions may only be superseded if, as NRC Staff states, "[a] party to an adjudication subject to this subpart may petition that the application of a Commission regulation specified in paragraph (a) of this section be waived or an exception made for the particular proceeding." 10 CFR § 2.1239(b). Such a petition for a waiver or exception may only be granted upon a *prima facie* showing of "special circumstances" demonstrating that the failure to consider the issue in question "would not serve the purpose for which the regulation was intended." *Id.*

Based on the above-mentioned regulatory provisions, Intervenor's area of concern regarding financial assurance should be barred from consideration as a matter of law. Initially, NRC regulations for 10 CFR Part 36 (Part 36) licensees dictate what type of and how much financial assurance must be provided before an NRC license will be issued. *See* 10 CFR § 30.35. Specifically for Part 36 licensees such as CFC Logistics, the applicant may select one of two financial assurance options: (1) a site-specific decommissioning cost estimate and plan *or* (2) a certification of financial assurance in the amount of \$75,000. *See id.* In its February, 2003 license application, CFC Logistics elected to submit a certificate of deposit in the amount of \$75,000 to NRC to satisfy the financial assurance requirement. *See* NRC Staff November 20, 2003 Brief at 2. The fulfillment of this requirement was acknowledged when NRC Staff issued a materials license to CFC Logistics. *See* Letter from John Kinneman, NRC, to James Wood, CFC Logistics, *CFC Logistics, Inc., Issuance of New License, Control No. 132825*, (August 27, 2003).

In the midst of the pre-hearing process, Intervenor submitted an area of concern to the Presiding Officer alleging that CFC Logistics' financial assurance package and its decision not to submit a decommissioning plan was insufficient to sustain its NRC license, as issued. *See* Intervenor August 14, 2003 Brief at 14. By alleging that CFC Logistics' \$75,000 financial assurance package is *insufficient* and arguing that a decommissioning plan must be submitted, Intervenor essentially have challenged the *sufficiency* of NRC regulations which permit certain Part 36 licensees to meet financial assurance requirements by posting a financial assurance certification in the amount of \$75,000 without a decommissioning plan. This challenge, absent "special circumstances," is not permitted under 10 CFR § 2.1239(a).

Further, NRC Staff correctly states that there is no evidence in the record demonstrating that Intervenor have petitioned for a waiver of or exception to NRC regulation(s) prohibiting challenges to such regulations nor have Intervenor attempted to demonstrate that "special circumstances" exist demonstrating that such a waiver or exception should be granted. Licensing of CFC Logistics' Category III irradiator has addressed the same licensing issues as with other similar Part 36 irradiators. Intervenor have provided no evidence demonstrating that "special circumstances" exist that would require some other type of financial assurance than that which is authorized by 10 CFR § 30.35. Therefore, Intervenor's area of concern regarding financial assurance should be barred from consideration in this proceeding as a matter of law.

In addition, NRC Staff raises the issue of the recent Commission rulemaking regarding financial assurance which orders licensees such as CFC Logistics to amend their financial assurance packages to include increases to the financial assurance amounts

and, potentially, requirements for decommissioning plans. *See* 68 Fed. Reg. 57327 (October 3, 2003). However, while CFC Logistics, like other similar licensees, will be required to conform to the rulemaking's provisions at a designated time in the future, NRC Staff correctly states "[t]hat rule is of future effect...and is not a requirement that CFC Logistics had to meet at the time of its licensing on August 27, 2003." NRC Staff November 20, 2003 Brief at 4. The Commission's new financial assurance requirements will become effective on December 3, 2003 and, after which, *all* licensees will be expected to comply with its provisions. However, the new financial assurance requirements specifically grant licensees, such as CFC Logistics, eighteen (18) months to satisfy the new requirements. The Commission would not have allowed licensees such a time period to comply with new financial assurance requirements if existing financial assurance requirements were not adequately protective of public health and safety.

Since this rulemaking's provisions were not in effect when CFC Logistics was issued its NRC license, CFC Logistics was justified in conforming its license application to previously existing NRC regulations (i.e., the permissible financial assurance certification option), and such action cannot be challenged in this proceeding under 10 CFR § 2.1239(a). Thus, CFC Logistics existing financial assurance requirements are sufficient to protect public health and safety until compliance with the Commission's new rulemaking can be effectuated.

II. CONCLUSION

For the reasons described above, CFC Logistics agrees with the statements presented by NRC Staff in its brief and respectfully requests that the Presiding Officer rule that Intervenor's area of concern regarding financial assurance be barred from consideration in this case as a matter of law.

Respectfully Submitted,



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NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

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CFC Logistics, Inc.

(Materials License Application)

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) Date: November 26, 2003
)

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Response of CFC Logistics, Inc. to NRC Staff's Brief Regarding Intervenors' Financial Assurance Area of Concern in the above-captioned matter has been served upon the following via electronic mail, facsimile and U.S. First Class Mail on this 26th day of November, 2003.

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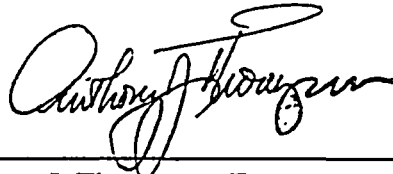
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November 26, 2003

BY ELECTRONIC MAIL, FACSIMILE AND U.S. FIRST CLASS MAIL

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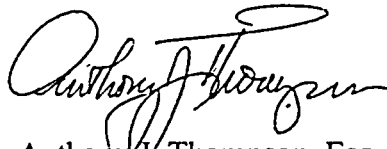
Re: In the Matter of: CFC Logistics, Inc.
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ASLBP No. 03-814-01-ML
License No. 132825

Dear Sir or Madam:

Please find attached for filing Response of CFC Logistics, Inc. to NRC Staff's Brief Regarding Intervenors' Financial Assurance Area of Concern in the above-captioned matter. Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped copy in the self-addressed, postage prepaid envelope attached herewith.

If you have any questions, please feel free to contact me at (202) 496-0780.
Thank you for your time and consideration in this matter.

Sincerely,



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Enclosures

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