

December 11, 2003 (12:46PM)

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:
Michael C. Farrar, Presiding Officer
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 Application))	Date: December 9, 2003
)	License Control No. 132825

RESPONSE OF CFC LOGISTICS, INC. TO INTERVENORS' REQUEST FOR
REFERENCE TO THE COMMISSION

CFC Logistics, Inc. (CFC Logistics), by its undersigned counsel of record, hereby submits this Response to Intervenor's Request for Reference to the Commission regarding CFC Logistics' Category III underwater irradiator located at its cold-storage facility in Quakertown, Pennsylvania. For the reasons described below, CFC Logistics respectfully requests that the Presiding Officer deny Intervenor's Motion because discovery is prohibited in Subpart L proceedings, the Motion constitutes an impermissible attack on Nuclear Regulatory Commission (NRC) regulations, and the question presented is not "novel" or "significant" and does not satisfy the Commission's standards for review of a certified question.

I. BACKGROUND AND PROCEDURAL HISTORY

In February, 2003, CFC Logistics submitted a license application to NRC's Region I office requesting that NRC grant CFC Logistics a materials license allowing it to possess cobalt-60 "sealed sources" for licensed irradiation operations in its Genesis

Category III underwater irradiator. This license application includes numerous pages of technical data designed to demonstrate that the Genesis Category III irradiator satisfies NRC's 10 CFR Part 30, 32 and 36 requirements for irradiators. During the course of its review of CFC Logistics' license application, NRC Region I Staff issued requests for additional information (RAIs) from CFC Logistics to complete its review. As a result of NRC Staff's RAIs, all of the submitted documents and information necessarily became part of CFC Logistics' license application. NRC Staff declared some of the submitted documents and information to be "proprietary" under 10 CFR § 2.790(a)(4) and withheld it from NRC's Public Document Room.

On August 27, 2003, after a comprehensive review of the entire license application, NRC Staff concluded that the application satisfies the above-mentioned NRC requirements and that CFC Logistics should be granted an NRC materials license for possession and use of cobalt-60 "sealed sources" in its Category III underwater irradiator.

Prior to the grant of CFC Logistics' NRC license, several individuals (hereinafter "Intervenors") requested a hearing to challenge CFC Logistics' license application. During the pre-hearing phase of this proceeding, CFC Logistics' license application, excluding the above-mentioned "proprietary" information, was made publicly available for Intervenors' review on NRC's ADAMS database. Later, Intervenors' requested that NRC Staff or CFC Logistics make the above-mentioned "proprietary" information available to their counsel and expert(s) for review. Such information was produced pursuant to a mutually agreed-upon protective order, which has been endorsed by the Presiding Officer.

After CFC Logistics' NRC license was issued, on October 29, 2003, the Presiding Officer granted Intervenor's request for a hearing. On November 12, 2003, the Presiding Officer conducted a telephone conference to discuss outstanding pre-hearing matters and scheduling of additional pre-hearing events. On this telephone conference, counsel for Intervenor requested that the Presiding Officer compel CFC Logistics to produce additional documents and information encompassing irradiator design drawings and correspondence between CFC Logistics and its cobalt-60 supplier, Reviss Services, Ltd. (Reviss). After a lengthy discussion, counsel for Intervenor requested that the Presiding Officer certify to the Commission the question of whether such documents and information qualified as "discovery," which is prohibited under Subpart L regulations. The Presiding Officer directed counsel for Intervenor to file a motion requesting such certification.

On December 1, 2003, Intervenor filed a Motion requesting certification to the Commission of the above-mentioned question. CFC Logistics hereby submits its Response to this Motion and respectfully requests that the Presiding Officer deny Intervenor's Motion because discovery is prohibited in Subpart L proceedings, the Motion constitutes an impermissible attack on NRC regulations, and the question presented is not "novel" or "significant" and does not satisfy the Commission's standards for review of a certified question.

II. ARGUMENT

A. Intervenor's Motion Should Be Denied Because Discovery is Prohibited in Subpart L Proceedings

If the Presiding Officer determines that Intervenor's Motion constitutes a formal motion to compel the production of documents from CFC Logistics, such Motion should

be denied because there is a blanket prohibition against discovery in Subpart L proceedings.¹ 10 CFR § 2.1231(d) states, “[a] party...*may not seek discovery* from any other party...or the NRC or its personnel, whether *by document production...or otherwise.*” (emphasis added). Previous NRC decisions have acknowledged that Intervenorors are not entitled to discovery, including document production, during a Subpart L proceeding. *See In the Matter of International Uranium (USA) Corp.* (White Mesa Mill), 56 NRC 113, *31 (August 28, 2002).

Based on this blanket prohibition, Intervenorors may not seek to compel any party to a Subpart L proceeding to engage in “discovery” involving document production. All that is left to determine is whether or not Intervenorors’ document request can properly be considered “discovery.”

According to Black’s Law Dictionary, Trial Practice tools of discovery include “production of documents or things.” *See Black’s Law Dictionary*, Sixth Edition, West Publishing Co., (1990). Intervenorors’ Motion requests an action identical to that defined as “discovery;” that CFC Logistics, a party to this Subpart L proceeding, be compelled to *produce documents and information* including design drawings related to its Category III irradiator and correspondence (i.e., letters, electronic transmissions) between CFC Logistics and Reviss. Thus, on its face, Intervenorors’ Motion requests that the Licensing Board allow “discovery,” which is prohibited in Subpart L proceedings. Therefore, Intervenorors’ Motion should be denied.

¹ On its face, Intervenorors’ Motion requests “directed certification” of their question to the Commission and has not requested that the Presiding Officer rule on the question. The issue of directed certification will be addressed in Section IIC of this brief.

B. Intervenor's Motion Should Be Denied As An Impermissible Attack on NRC Regulations

The substance of Intervenor's Motion also includes statements alleging that 10 CFR § 2.1231(d)'s prohibition on discovery in Subpart L proceedings is inconsistent with the National Environmental Policy Act of 1969 (NEPA). *See* Intervenor's December 1, 2003 Motion at 2. Accordingly, Intervenor seeks a decision from the Commission reversing the provisions of 10 CFR § 2.1231(d) without the required rulemaking proceeding² to allow discovery to occur. *See id.* Thus, Intervenor's request constitutes an impermissible attack on this particular NRC regulation.

10 CFR § 2.1239 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 subject to this subpart [L].*" (emphasis added). Indeed, it has been recognized that a party's allegation that the application of Subpart L "informal hearing procedures" denied it a fair hearing was not permissible under 10 CFR § 2.1239. *See In the Matter of Hydro Resources, Inc.* LBP-99-13, 49 NRC 233, *6 (March 9, 1999).

In the instant case, Intervenor's claim that application of 10 CFR § 2.1231(d)'s provisions in this proceeding is inconsistent with NEPA closely resembles that made by the intervenors in *Hydro Resources*. Intervenor alleges that a prohibition on discovery in this proceeding is contrary to the provisions of NEPA. The next logical step in this allegation is that the prohibition on discovery would render this hearing "unfair." As demonstrated in *Hydro Resources*, such an allegation constitutes a challenge to NRC regulations and is prohibited by 10 CFR § 2.1239. *See In the Matter of Hydro Resources*;

² *See generally Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co. et al.*, 463 U.S. 29 (1983).

Inc. LBP-99-13, 49 NRC 233, *6 (March 9, 1999). Thus, Intervenor's Motion should be dismissed as an impermissible attack on the validity of 10 CFR § 2.1231(d).

Intervenor's Motion also alleges that, because 10 CFR § 2.1231(d) is contrary to the principles outlined under NEPA with respect to full disclosure, Intervenor is prevented from properly assessing potential environmental impacts associated with CFC Logistics' Category III underwater irradiator.³ Intervenor's December 1, 2003 Motion at 2. However, Intervenor's reliance on the applicability of NEPA to NRC's Subpart L hearing procedures is misplaced. It is well-settled that, as an independent regulatory agency, NRC "is not bound by those portions of CEQ's [Council on Environmental Quality's] NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions." 49 Fed. Reg. 9352, 9356 (March 12, 1984). As such, NRC is permitted to determine what information is relevant to the review of a license application and what information is not required for submission through its licensing regulations and RAIs. As a result, courts have determined that "the nature and form of environmental analysis required in any given case are matters left to the agency involved." *Id.* Thus, in circumstances where environmental evaluations are warranted (e.g., review of a Part 36 license application), "the judgment of the NRC as the agency with the requisite technical expertise should govern." *Id.*

In exercising this "judgment," NRC, through its regulations and RAI processes, already has determined the proper scope of documents and information required for a NEPA review of CFC Logistics' license application. Those documents and information currently are publicly available for Intervenor's review in the hearing file and/or in the

³ It is worth noting that, even if NEPA were applicable here, Intervenor makes no attempt to cite which provisions of NEPA support their argument.

“proprietary” documents released to Intervenor several months ago. Thus, NRC’s current regulatory framework for the scope of review of license applications and the conduct of Subpart L proceedings *is in compliance* with NEPA and, as such, Intervenor’s allegation that Subpart L’s prohibition on discovery is a violation of NEPA is incorrect, even if NEPA were to be applicable here.

C. Intervenor’s Motion Does Not Warrant Certification of the “Discovery” Question to the Commission

1. Certification of a Ruling: Interlocutory Appeals

Finally, should the Presiding Officer rule on and deny Intervenor’s Motion for production of documents, the “discovery” question should not be certified to the Commission because it does not meet the Commission standards for review. Requests for certification of Licensing Board rulings to the Commission fall under the classification of “interlocutory review.” *See* 10 CFR § 2.730. Current Commission policy indicates that there is no right to appeal any interlocutory ruling by a Licensing Board. *See* 10 CFR § 2.730(f). Interlocutory appellate review of Licensing Board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 2 & 3), ALAB-742, 18 NRC 300, 383, n. 7 (1983) *citing* *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 483-6 (1975). The Commission encourages Licensing Boards to refer rulings which present *novel* questions which could benefit from early resolution. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000) *citing* *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1988) (emphasis added).

The case law standards for acceptance of a Licensing Board ruling for interlocutory review have been codified in 10 CFR § 2.786(g) which provides that the Commission may conduct discretionary interlocutory review if the party demonstrates that the certified question either (1) threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a petition for review of the Presiding Officer's final decision or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. *See Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992). Specifically, discovery rulings rarely meet the test for discretionary interlocutory review. *See e.g., Long Island Lightning Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 381 (1984).

Under the first test for review, immediate and serious irreparable impact, mere generalized representations by counsel or unsubstantiated assertions regarding "immediate and serious irreparable impact" are insufficient to meet the stringent threshold for interlocutory review. *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994). Under the second test for review, pervasive and unusual effect on the proceeding, review is granted only in extraordinary circumstances. Adverse evidentiary rulings may turn out to have little, if any, evidentiary effect on the Licensing Board's ultimate decision. Thus, determinations regarding what evidence should be admitted rarely, if ever, have a pervasive and unusual effect on the structure of a proceeding so as to warrant interlocutory review. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984).

Intervenors' Motion fails to even address either of the tests delineated for certification of a question to the Commission and does not even attempt to address the two tests for Commission interlocutory review – *i.e.*, immediate and serious irreparable impact or a pervasive or unusual effect on the proceeding. Thus, Intervenors' Motion should be denied.

2. Directed Certification: 10 CFR § 2.718(i)

Intervenors also may request that the Presiding Officer certify a question to the Commission for review without a prior ruling by the Licensing Board. Under 10 CFR § 2.718(i), a party may request that a question be certified to the Commission without a ruling from the Licensing Board. However, authority to certify questions to the Commission should be exercised sparingly, and, absent a compelling reason, certification should be declined. *See Consolidated Edison Co. of N.Y. Power Authority of the State of N.Y.* (Indian Point, Unit 2; Indian Point, Unit 3), LBP-82-23, 15 NRC 647, 650 (1982); *see also Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-421, 6 NRC 25, 27 (1977).

If Intervenors' are indeed seeking directed certification under 10 CFR § 2.718(i), they must, at a minimum, establish that referral under 10 CFR § 2.730(f) would have been appropriate (*i.e.*, that a failure to resolve the problem will cause the public interest to suffer or will result in unusual delay and expense.) *See Puerto Rico Water Resources Authority* (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976).

Intervenors' Motion, however, only alleges that the information is relevant and that failure to allow for discovery would conflict with the provisions of NEPA without even

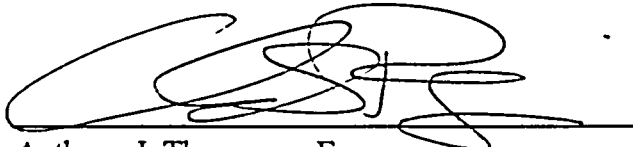
referencing relevant provisions of that statute, if any. *See* Intervenor's December 1, 2003 Motion at 2. As shown above, the documents and information in question are not relevant to CFC Logistics' license application because NRC regulations did not require their submission and NRC Staff did not request them for review through RAIs. As such, exclusion of such documents and information from this proceeding is not a violation of NEPA because NRC, under its authority as an independent regulatory agency with the technical expertise to review matters related to public health and safety, has determined what documents and information are relevant to this proceeding. Intervenor's have provided no evidence demonstrating that the public interest will be harmed or that undue or unusual delay or expense will be incurred. Thus, Intervenor's Motion does not satisfy the Commission's standards for certification and should be denied.

Further, the "discovery" question presented by Intervenor's does not represent a "novel" or "significant" question requiring prompt Commission review. NRC regulations explicitly prohibit discovery in Subpart L proceedings because, Subpart L proceedings are "informal" unlike more formal proceedings where traditional discovery is permitted through depositions, interrogatories or document production. *Compare* 10 CFR § 2.1101 *et seq.* A prohibition on discovery does not present a novel question of law because the Commission already has addressed it in a rulemaking proceeding which led to the blanket prohibition against discovery in Subpart L proceedings.

III. CONCLUSION

For the aforementioned reasons, CFC Logistics respectfully requests that the Presiding Officer dismiss Intervenor's Motion because discovery is prohibited in Subpart L proceedings, the Motion constitutes an impermissible attack on NRC regulations, and

the question presented is not novel or significant and does not satisfy the Commission's standards for acceptance of a certified question.


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**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**

In the Matter of:
CFC Logistics, Inc.

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) Docket No.: 30-36239-ML
)
) ASLBP No.: 03-814-01-ML
)
) License No. 132825
)
) Date: December 9, 2003
)

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Response of CFC Logistics, Inc. to Intervenors' Request for Reference to the Commission in the above-captioned matter has been served upon the following via electronic mail, facsimile and U.S. First Class Mail on this 9th day of December, 2003.

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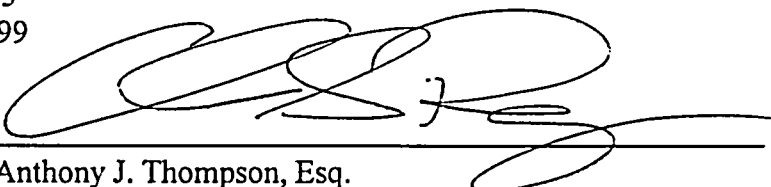
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December 9, 2003

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

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Re: In the Matter of: CFC Logistics, Inc.
Docket No: 3036239-ML
ASLBP No. 03-814-01-ML
License No. 132825

Dear Sir or Madam:

Please find attached for filing Response of CFC Logistics, Inc. to Intervenors' Request for Reference to the Commission 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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