

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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April 14, 2004 (3:13PM)

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:
CFC Logistics, Inc.

(Materials License Application)

) Docket No.: 30-36239-ML
)
) ASLBP No.: 03-814-01-ML
)
) Date: April 12, 2004
)
) License Control No. 132825

CFC LOGISTICS, INC.'S REPLY TO INTERVENORS'
APRIL 2, 2004, FILING REGARDING SANCTIONS

CFC Logistics, Inc. (CFC), by its undersigned counsel of record, hereby submits this Reply to Intervenor's April 12 Filing regarding CFC's Nuclear Regulatory Commission (NRC)-licensed Category III underwater irradiator (the "Irradiator") located in Quakertown, Pennsylvania. For the reasons discussed below, CFC respectfully requests that the Presiding Officer deny Intervenor's motion for sanctions.

I. BACKGROUND AND PROCEDURAL HISTORY

On December 11, 2003, the Presiding Officer held a pre-hearing conference in Quakertown, Pennsylvania, at which counsel for CFC and Intervenor participated. Based on the discussions at the pre-hearing conference, the Presiding Officer determined that NRC Staff should be required to submit additional information regarding several outstanding issues in this proceeding.

On February 17, 2004, the Presiding Officer issued an Order in which NRC Staff was required to file two pleadings answering specific questions regarding several

outstanding issues, including CFC's Sales Agreement with its irradiator designer, Gray*Star, Inc., the "check valve" on the Irradiator's plenum, Intervenor's request for discovery, and CFC's financial assurance package. On February 27 and March 5, 2004, respectively, NRC Staff filed pleadings responding to these specific questions.

Pursuant to the Presiding Officer's February 17, 2004, Order, on March 5 and 12, 2004, respectively, CFC responded to each of NRC Staff's pleadings in which CFC supported NRC Staff's conclusions and supported such conclusions with additional argument.¹ Then, on March 15, 2004, Intervenor's filed a Motion to Release Filing From Protective Order, For Extension and Sanctions in which Intervenor's requested that the Presiding Officer impose monetary sanctions on CFC for subjecting its March 5 and 12, 2004 submissions to the mutually agreed-upon protective order in this proceeding (hereinafter the "Protective Order").

On March 17, 2004, the Presiding Officer issued an Order in which CFC was required to reply to Intervenor's March 15, 2004, Motion and to provide additional information regarding the Licensing Board's authority to issue sanctions. In an effort to reach an amicable solution to Intervenor's Motion, CFC pursued and obtained permission from relevant parties, including REVISS Services, Ltd. (REVISS), CFC's cobalt-60 "sealed source" provider, to release its March 5 and 12, 2004 submissions from the Protective Order. On March 19 and 22, 2004, respectively, CFC submitted two pleadings

¹ As will be discussed below, the Presiding Officer's February 17, 2004 Order specifically anticipated that CFC potentially could offer additional *argument* supporting NRC Staff's position when it stated, "the [I]ntervenor's will then have one week from the date of the Company's electronic submission (of either a commentary or a "no-file" election) to file its response to the Staff's brief and any additional Company arguments)." *In the Matter of CFC Logistics, Pre-Hearing Order Regarding NRC Staff Participation and Other Matters*, at 3 (February 17, 2004) (emphasis added).

demonstrating that such permission had been obtained, that CFC had no objection to releasing its March 5 and 12, 2004, submission from the Protective Order, and that CFC would not object to allowing Intervenors a reasonable time extension to respond to CFC's and NRC Staff's submissions.

On March 23, 2004, the Presiding Officer held a pre-hearing telephone conference where issues related to Intervenors' March 15, 2004, Motion was discussed. At this telephone conference, the Presiding Officer directed Intervenors to respond to CFC's and NRC Staff's submissions by April 2, 2004 and, should Intervenors continue to pursue sanctions against CFC, then CFC would be entitled to respond to Intervenors' Response. Thereafter, on April 2, 2004, Intervenors responded to CFC's and NRC Staff's submission and included argument and expert testimony regarding the Presiding Officer's questions and several additional issues. In this Response, CFC respectfully requests that the Presiding Officer deny Intervenors' motion monetary and non-monetary for sanctions.

II. ARGUMENT

A. Intervenors' Motion for Sanctions Should be Denied

In their April 2, 2004 Motion, Intervenors reiterate their request that sanctions be imposed on CFC, because CFC's March 5 and 12, 2004 submissions allegedly included "new extensive argument and material [that] should have been submitted on November 26, [2003]." Intervenors' March 15, 2004 Motion at 2. Based on the submission of these arguments, Intervenors argue that sanctions should be imposed because of "the burden CFC's new filing[s] place on Intervenors." *Id.* Moreover, while Intervenors' incorporate their March 15, 2004 Motion into their April 2, 2004, Motion, they now request that the

Presiding Officer stay CFC's materials license *as a sanction* as opposed to deciding the stay issue on the merits of substantive argument. Intervenor's April 2, 2004 Motion Re: Staff Questions at 13. Intervenor's Motion for monetary and non-monetary sanctions should be denied.

1. Monetary Sanctions Should Not Be Imposed Because CFC Has Remedied Any Alleged Improprieties

In their March 15, 2004, Motion, Intervenor requested that the Presiding Officer impose approximately \$5,000 in monetary sanctions on CFC for subjecting its March 5 and 12, 2004 submissions to the Protective Order and for imposing a burden on Intervenor. Without admitting that monetary sanctions would be appropriate or even legal under such circumstances, CFC requests that Intervenor's Motion be denied because CFC has remedied any alleged improprieties.

After Intervenor filed their March 15, 2004 Motion, as a demonstration of good faith, CFC consulted with and obtained the permission of relevant persons, including REVISS, to release all portions of CFC's March 5 and 12, 2004 submissions from the Protective Order. CFC informed Intervenor and the Presiding Officer of the release of these documents through two written pleadings on March 19 and 22, 2004, respectively, which provided Intervenor ample opportunity to seek the opinion of other persons outside the scope of the Protective Order. In addition, CFC noted that it had no objection to a reasonable time extension to provide additional time for Intervenor to consult with relevant persons. Thus, based on CFC's good faith actions, Intervenor were placed in exactly the same position as they would have been if CFC's submissions were not asserted to be subject to the Protective Order at the time of filing.

The *Hydro Resources* case, as decided by the Commission, is instructive on this matter. In *Hydro Resources*, the intervenors submitted a pleading before the Commission that exceeded the required page limit by six (6) pages. *In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-00-08, 51 NRC 227, *26 (May 25, 2000). In response, the licensee filed a motion to strike intervenors' pleading based on the fact that such pleading willfully violated regulations for submission of pleadings before the Commission. *Id.* In that motion, the licensee requested that the Commission impose monetary sanctions on intervenors to compensate the licensee for costs associated with the preparation of its motion to strike. *Id.* After the licensee's motion to strike was filed, intervenors re-filed their pleading and removed the violating pages from their previous submission. *Id.* at 26-27. After reviewing all the pleadings, including the licensee's motion to strike, the Commission determined that monetary sanctions should not be imposed on intervenors because "we hardly consider the exceeding of a page limit to be an error so great as to merit such a sanction—*especially when the offending counsel immediately corrected the error once attention was brought to it.*" *Hydro Resources, Inc.*, 51 NRC at *27 (emphasis added).

Like the intervenors in *Hydro Resources*, CFC's action to correct any alleged improprieties has returned Intervenor to the exact position they would have been in had CFC's submission not been subject to the Protective Order. In addition, the Presiding Officer granted Intervenor a time extension, to which CFC did not object, so that Intervenor could have additional time to review CFC's submissions. Thus, like the intervenors in *Hydro Resources*, CFC has remedied any *alleged* improprieties associated

with its March 5 and 12, 2004 submissions and, thus, Intervenor's request for monetary sanctions should be denied.

2. Monetary Sanctions Should Not Be Imposed Because Intervenor's Have Not Suffered Any Undue Burden

Intervenor's March 15, 2004 Motion requests that the Presiding Officer impose sanctions in the amount of \$5,000 to compensate Intervenor for "the burden CFC's new filings place on Intervenor." Intervenor's March 15, 2004 Motion at 2. Intervenor alleges that such sanctions are warranted, because CFC's action subjecting its March 5 and 12, 2004 submissions to the Protective Order "place[d] a tremendous logistical expense and burden on Intervenor." *Id.* Indeed, Intervenor's Motion claims that monetary sanctions are warranted because "Intervenor must adequately respond to new arguments and supporting materials as well as seek the opinion of an expert." *Id.* Thus, Intervenor's Motion appears to represent an attempt to be *compensated* for additional time and effort spent on preparation of their responses to CFC's submissions.

CFC's submissions do not exceed the scope of the Presiding Officer's questions in his February 17, 2004, Order and, as a result, Intervenor has not suffered any undue burden. In his February 17, 2004 Order, the Presiding Officer set out a briefing schedule for all parties to respond to questions in that Order regarding the remaining pre-hearing issues. When setting forth Intervenor's filing date, the Presiding Officer explicitly stated, "the [I]ntervenor will then have one week from the date of the Company's electronic submission (of either a commentary or a "no-file" election) to file its response to the Staff's brief and any additional Company arguments." *In the Matter of CFC Logistics, Pre-Hearing Order Regarding NRC Staff Participation and Other Matters*, at 3 (February 17, 2004) (emphasis added). Based on this language, the Presiding Officer anticipated

that CFC's responses to NRC Staff's submissions potentially could include additional argument supporting and/or refuting such submissions. If Intervenor had any objections to CFC filing additional argument regarding NRC Staff's submissions and the Presiding Officer's questions, they should have objected at that time. Since no such objection was raised, Intervenor has waived any objections to CFC's additional arguments.

CFC's March 5, 2004 submission (in response to NRC Staff's February 27, 2004 submission) directly addressed each of the questions raised by the Presiding Officer and discussed by NRC Staff (i.e., the CFC Sales Agreement, the REVISS "concerns" regarding the "check valve," and Intervenor's request for discovery). For example, when addressing REVISS' concerns regarding the "check valve," CFC explicitly agreed with the conclusions of NRC Staff and submitted additional documentation from REVISS demonstrating that their "concerns" were no longer relevant to the proceeding. While CFC admits that these documents were not yet in the hearing record, counsel for CFC did not have these documents in its possession until the afternoon of the December 11, 2003 pre-hearing conference. Indeed, counsel for CFC did attempt to introduce these documents into the record at that time, but the Presiding Officer noted that such a submission could not, at that particular time, be effectuated. *See In the Matter of CFC Logistics, Transcript of Pre-Hearing Conference*, Tr. at 366 (December 11, 2003). Since there was considerable confusion and dispute over the reasons behind REVISS' "concerns," CFC deemed it prudent and responsible to submit such documents in its March 5, 2004 submission so that the Licensing Board properly understands that such concerns are no longer relevant.

With respect to the decommissioning of the PermaGrain facility, CFC's reply also supported NRC Staff's conclusions without raising additional issues outside the scope of the Presiding Officer's questions. The Presiding Officer requested that NRC Staff comment on "the reasons why the nature and operation of the facility that existed thereon are, or are not, thought to be analogous to the nature and proposed operation of the facility before us herein." *In the Matter of CFC Logistics, Pre-Hearing Order Regarding NRC Staff Participation and Other Matters*, at 4 (February 17, 2004). The information provided in CFC's March 12, 2004, submission and its accompanying affidavit discussed information directly related to the PermaGrain facility's decommissioning activities, their related costs, and comparisons between that facility and the CFC Irradiator demonstrating that the two facilities are not analogous. Indeed, as noted in CFC's February 25, 2004 Motion for Leave to Respond to NRC Staff's March 5, 2004, Response, CFC stated its intent to offer additional information regarding the PermaGrain facility because a member of its staff worked on that particular remediation project. Issues regarding the PermaGrain facility and comparisons to the CFC Irradiator were not directly addressed prior to the December 11, 2003, pre-hearing conference and NRC Staff's March 5, 2004, submission. Thus, CFC's March 12, 2004, submission regarding the PermaGrain facility was the first opportunity for CFC to address that issue.

Further, CFC's argument regarding the PermaGrain facility was described in the context of the standard for waivers of Commission regulations in Subpart L proceedings. As stated above, the Presiding Officer's central question regarding Intervenors' financial assurance area of concern was whether the CFC Irradiator and the PermaGrain facility

were *analogous*. This statement is supported by the Presiding Officer's February 17, 2004, Order which states:

"To the extent that the other site and facility are analogous, the Staff should go on to address whether the similarities between them would call for us to send to the Commission the questions of whether (1) the decommissioning bond regulations -- cited by the other parties as a reason to reject the intervenors' position -- can be expected in this instance to serve the purpose for which they were intended or (2) special circumstances exist that would make the applicability of those regulations inappropriate in this instance."

Id. at 4-5.

CFC would have been remiss not to comment on NRC Staff's response to this question in a context other than the standard set forth by the Commission. To address NRC Staff's response within the scope of this standard, CFC presented argument demonstrating that Intervener's area of concern represented a direct attack on the Commission's policy regarding challenges to its regulations in Subpart L hearings and that no "special circumstances" exist warranting reference of this area of concern to the Commission. Thus, CFC's argument regarding the PermaGrain facility and Intervenor's financial assurance area of concern did not exceed the scope of the Presiding Officer's questions and NRC Staff's response and, as such, does not warrant the imposition of sanctions.

While CFC does admit that its March 5 and 12, 2004, submissions included supplemental documents and affidavits, these submissions did not, at any point, address *issues* outside the scope of the Presiding Officer's questions. Previously, the Licensing Board considered the pleadings of intervenors and a licensee in *In the Matter of International Uranium Corporation* regarding intervenors' area of concern on truck transportation. 55 NRC 307 (April 26, 2002). In response to the licensees' submission, intervenors submitted a pleading in which they sought to present argument regarding

additional areas of concern previously argued in substantive pleadings, *but not the subject of the Presiding Officer's Order regarding truck transportation*. *Id.* at *12-13. The Presiding Officer determined that raising additional *issues* (not argument) outside the scope of a given pleading or order potentially may warrant a "significant" sanction, especially when the party demonstrates a history of such action. 55 NRC at *13. In the instant case, the arguments presented by CFC in its March 5 and 12, 2004, submissions were within the scope of the issues raised by the Presiding Officer and addressed by NRC Staff. While additional *argument* was presented, no additional *issues* were raised causing Intervenor to respond to issues that could not reasonably be anticipated. Thus, based on the Licensing Board's holding in *International Uranium Corporation*, Intervenor's request for monetary sanctions should be denied.

B. Intervenor's Request for Non-Monetary Sanctions Should Be Denied

In their April 2, 2004 submission regarding the Presiding Officer's questions, Intervenor supplement their Motion with the novel request that the Presiding Officer issue a stay of CFC's materials license as a *sanction*. Intervenor's April 2, 2004 Motion Re: Staff Questions at 12. Intervenor's claim that, should a stay be issued, CFC's only remedy would be to release additional documents associated with REVISS and the "check valve" to comply with an *alleged* requirement to release such documents and "because of the abuse of the Board's process through the extension of its arguments well beyond those which were authorized regarding safety standards required by REVISS." *Id.* at 13. Intervenor's motion for non-monetary sanctions should be denied.

As a general proposition, stays of NRC Staff licensing actions are extraordinary measures and are to be issued only in circumstances where the moving party has met the

substantive standards articulated by the Commission for issuing stays. *See* 10 CFR §§ 2.788 & 2.1263. There is no Commission precedent demonstrating that stays may be issued as a punitive non-monetary sanction rather than as a merits-based decision. Intervenor also have provided no evidence that the Licensing Board has the authority to issue a stay of an NRC Staff licensing action as a sanction. Thus, Intervenor have not demonstrated that a stay of an NRC Staff licensing action is available as a non-monetary sanction in a Subpart L proceeding.

Further, Intervenor claim that CFC should not be released from such a stay unless they comply with an *alleged* requirement to release additional documents pertaining to REVISS and their “concerns” regarding CFC’s “check valve”² is totally inconsistent with existing Commission regulations (i.e., 10 CFR § 2.1231(d)’s prohibition on discovery). It is common practice for licensees and intervenors in Subpart L proceedings to submit documents that are not included in NRC Staff’s hearing file to support their positions. However, the submission of such documents does not necessarily trigger the need for or the right to discovery. For example, intervenors or licensees submitting expert testimony in the form of affidavits in Subpart L proceedings are not subject to discovery in the form of depositions. In the instant case, Intervenor are entitled to refute the conclusions set forth in CFC’s supporting documents (i.e., expert affidavits, REVISS letters) using their expert’s testimony or additional argument, but they are not entitled to demand the release of other documents from CFC. Thus, Intervenor’s allegation that CFC is required to release additional documents in this proceeding is without merit.

² *See* Intervenor’s April 2, 2004 Motion Re: Staff Questions at 13.

Moreover, Intervenor's have failed to demonstrate that CFC has acted in a manner which is inconsistent with Commission regulations or with the Presiding Officer's February 17, 2004 Order. As shown above, CFC's March 5 and 12, 2004 submissions did not exceed the scope of the *issues* presented in the Presiding Officer's questions. In fact, after reviewing Intervenor's April 2, 2004, submissions, it is apparent that Intervenor's did not require the release of CFC's March 5 and 12, 2004 submissions from the Protective Order to prepare their responses. Intervenor's submissions do not utilize the opinion of any additional experts above and beyond those already subject to the protective order and each conclusion submitted either already has been submitted or could have been formulated without such documents being released from the Protective Order. Thus, Intervenor's have not demonstrated that they were "prejudiced" in any way with respect to CFC's action to subject its submissions to the Protective Order.

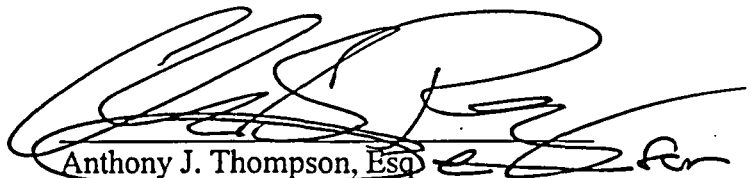
Finally, while they continue to argue that CFC presented substantial and *expansive new argument*, Intervenor's own submission states that "Intervenor's *expand* upon their reasons established in the Renewed Motion for Stay dated November 10, 2003...." By expanding upon their reasons set forth in their November 10, 2003 Renewed Motion for Stay, Intervenor's effectively have raised new *issues* which were not the subject of the Presiding Officer's February 17, 2004 Order. For example, Intervenor's, through written argument and expert testimony, presented argument on their areas of concern regarding "loss of electricity," "heat calculations," and "cask drop accidents." See 3rd Declaration of Marvin Resnikoff at 1-3. The Presiding Officer's February 17, 2004 Order, NRC Staff's February 27 and March 5, 2004 submissions, and CFC's March 5 and 12, 2004 submissions do not address these issues in any way. Thus,

Intervenors have purposefully availed themselves of an opportunity to submit additional argument regarding issues that were not raised by the Presiding Officer which the Licensing Board in *International Uranium Corporation* determined could warrant a "significant" sanction. See 55 NRC at *13. Thus, Intervenors request for non-monetary sanctions should be denied.

III. CONCLUSION

For the reasons discussed above, CFC respectfully requests that the Presiding Officer deny Intervenors' motion for sanctions.

Respectfully Submitted,



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Before Administrative Judges:

**Michael C. Farrar, Presiding Officer
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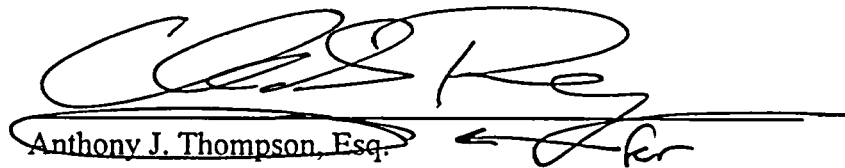
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing CFC Logistics, Inc.'s Reply to Intervenor's April 2, 2004 Filing Regarding Sanctions in the above-captioned matter has been served upon the following via electronic mail, facsimile and U.S. First Class Mail on this 12th day of April, 2004.

1. Robert J. Sugarman, Esq.
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April 12, 2004

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

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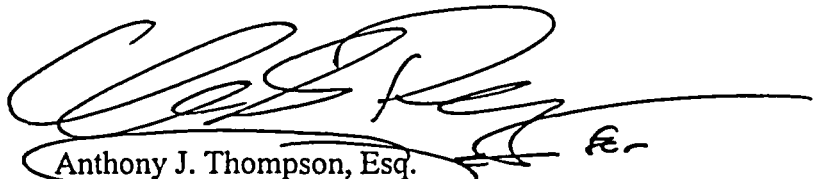
Re: In the Matter of: CFC Logistics, Inc.
Docket No: 3036239-ML
ASLBP No. 03-814-01-ML
License No. 132825

Dear Sir or Madam:

Please find attached for filing CFC Logistics, Inc.'s Reply to Intervenors' April 2, 2004 Filing Regarding Sanctions 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,



Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Law Offices of Anthony J. Thompson, P.C.
Counsel of Record to IUSA

Enclosures
(CFCCOVERLETTER1.DOC)