

RAS 8014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL
Before Administrative Judges:

Michael C. Farrar, Presiding Officer
Dr. Charles N. Kelber, Special Assistant

In the Matter of

CFC LOGISTICS, INC.

(Materials License)

Docket No. 30-36239-ML

ASLBP No. 03-814-01-ML

June 28, 2004

MEMORANDUM AND ORDER
(Regarding Possible Settlement)

This proceeding was initiated by a number of residents of the Quakertown, Pennsylvania area who were opposed to the licensing by the NRC Staff and the operation by CFC Logistics of an irradiator, housed in the Company's nearby food warehouse, that would employ cobalt-60 sources to irradiate food and other materials for purposes of destroying organisms that might cause spoilage of those products. In recent weeks, our colleague, Judge Paul Abramson, acting as a Settlement Judge, has been meeting with the respective adversaries, both separately and together, to determine whether the controversy can be amicably resolved.¹

We have now been advised by Judge Abramson that settlement is a distinct possibility, and that further negotiations to that end will likely take place early next month. In anticipation of a potential successful outcome to those negotiations, it is timely for us at this juncture to alert the numerous residents whose petition triggered the proceeding, but who have not been directly involved in the negotiations, to the procedures that will be followed to obtain their approval -- or to allow them to pursue their disapproval -- if a settlement is indeed reached by the negotiators.

¹ Because he has no role whatsoever in the decision on the merits of the case, Judge Abramson is not bound by the ex parte rule, which ordinarily precludes a jurist from discussing the case without all parties being present.

In order to put those approval procedures in context, we first set out the respective roles that have been played thus far by, among others, (1) the individual residents who formally petitioned for intervention to oppose the Company's plans and (2) an umbrella organization, Concerned Citizens of Milford Township (CCMT), which (without intervening formally) has taken the informal lead (both financially and strategically) in supporting the litigation. In that regard, we also recount the various rulings and references we made in our earlier decisions regarding the status of the individual petitioners and the umbrella organization. We then go on to enunciate the settlement approval procedures we will employ in the event the ongoing settlement discussions ultimately succeed.

1. Prior Events. This proceeding was initiated by some twenty-five individuals residing at various distances from the Company's warehouse. Those individuals joined in filing a Petition to Intervene in the proceeding, and it was in their name that the substantive "areas of concern" about the facility were presented. In filing that Petition, they were represented by counsel, who has since continued to represent them throughout the many steps of the litigation before us (having authorized the filings on their behalf, it was not necessary for all the individual petitioners to participate actively in the management of that litigation).

After denying the Petitioners' initial request to stay the effectiveness of the license pending the outcome of the litigation (LBP-03-16, 58 NRC 136 (September 23, 2003)), we turned to the question of the "standing" of the individual Petitioners to raise the issues they sought to put before us. LBP-03-20, 58 NRC 311 (October 29, 2003).² In doing so, we traced the principles that govern the standing of those who seek to participate in NRC proceedings based on their proximity to the proposed facility in issue. 58 NRC at 317-22.

² As indicated in the earlier stay decision (58 NRC at 141), we had assumed, for purposes of that ruling, that at least some of the Petitioners would be found to have standing.

Based on that analysis, we found that three of the Petitioners -- Andrew Ford, Tom Helt and Kelly Helt, each of whom lived about one-third of a mile from the Company's irradiator -- indeed had proximity-based standing. 58 NRC at 322. As to the others, we found it unnecessary to reach the question of their standing, because (1) in any event the proceeding could be maintained by the three on behalf of all;³ and (2) we expected CCMT, the organization that was a driving force behind the opposition, to intervene to represent the interests of all its members.⁴

Because no formal Notice of Hearing had been issued by the NRC Staff in advance of its approval of the license, it fell to us to issue such a Notice after we decided that a hearing was warranted by the first Petition. We did so, on October 30, 2003 (see 68 Fed. Reg. 62638, November 5, 2003). That Notice triggered a Petition filed on behalf of eight additional residents. It appeared from their Petition that most of them may have sought formal participatory status primarily to insure that they could be included in the second site visit being hosted by the Company, which we had indicated would be open to formal participants and to designated representatives of CCMT (see our Prehearing Orders of November 19, 2003, p. 3, and December 2, 2003, p. 2).

³ 58 NRC at 322-23. Courts routinely follow a similar approach in this regard, finding it unnecessary to evaluate the standing of all participants on one side if one of them is found to have standing. See Env'tl. Action v. FERC, 996 F.2d 401, 406 (D.C. Cir. 1993); U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 719 (1990); Nat'l Min. Ass'n v. U.S. Dept. of Interior, 70 F.3d 1345, 1349 (D.C. Cir. 1995). The reason for this approach at the appellate court level is, of course, that analyzing the standing of the others may involve more difficult questions that will have no practical effect on the course and outcome of the appeal. A similar rationale guided our decision to limit our treatment of the standing issues before us.

⁴ See 58 NRC at 323, where we expressed our anticipation that the forthcoming Notice of Hearing "could lead to additional . . . entities" filing petitions to intervene and spoke of the "possibility that additional . . . organizations may later seek to join" In that regard, we had previously noted, on the first page of our first published decision, that "although for purposes of appearing in other venues the facility's opponents have apparently coalesced in an organization called 'Concerned Citizens of Milford Township' (CCMT), that group as such has not yet sought to appear before us." 58 NRC at 137, n. 1 (emphasis added).

On December 11, 2003, we held both (1) an oral argument on Petitioners' renewed stay motion and on their related request for production of documents, and (2) a prehearing conference for the primary purpose of sharpening the admitted "areas of concern" for the later written presentations on the merits. During that session, we indicated once again, as we had in LBP-03-20, 58 NRC at 336, that the case seemed amenable to settlement (Tr. at 415-24). To that end, on March 15, 2004, we made a formal request of the Licensing Board Panel's Chief Administrative Judge that he appoint a Settlement Judge,⁵ and he duly appointed Judge Abramson to that role the next day.

2. Current Negotiations. As we understand it from Judge Abramson, the active participants on the residents' side of the settlement negotiations have been the admitted Intervenor Kelly Helt and a small group of the members of CCMT, led by Kimberly Haymans-Geisler. Mrs. Haymans-Geisler's previous efforts on behalf of the residents were noted in one of our earlier decisions,⁶ and it is apparent from other indicia that she has been a driving force behind the opposition to the facility, both in our proceeding and in the community. She has done this notwithstanding that neither she nor, as already mentioned, CCMT itself, has formally petitioned to intervene.⁷

⁵ The reasons for our delay in making that formal request are not relevant at this point in the proceeding.

⁶ See LBP-03-16, 58 NRC at 139, n. 6, where we noted her role in preparing an informal transcript (of a meeting conducted by the NRC Staff) that was brought to our attention for a limited purpose.

⁷ We mention her non-petitioner/intervenor status not to be critical thereof but to highlight the procedural problem facing us: the presence, on the one hand, of those who sought to participate formally but who may not be actively engaged in the litigation (or in the settlement discussions) and, on the other hand, the intense activity of those who may not be formal participants but who, on behalf of all those opposed to the facility, have supported the litigation financially and directed it strategically. We note in this regard that the Company has acquiesced in her participation in the settlement negotiations, notwithstanding her lack of formal participant status in the litigation.

Assuming the ongoing negotiations lead to an agreed-upon settlement, Judge Abramson (and the Company) will be faced with the question of who the signatories from the neighboring community should be to make the settlement binding on their side as much as it would be on the other.⁸ As has been seen, there are, among those who have been opposing the facility, at least the following entities: (1) those three petitioners whose intervention we approved; (2) those other (somewhat more distantly-located) neighbors who joined in the first petition but whose standing to be intervenors was unnecessary to determine at that point;⁹ (3) the additional residents who filed the second petition but whose primary interest may have been to insure their participation in the second site visit; (4) the organization CCMT, which has been a force behind the opposition but which never sought to intervene formally, notwithstanding our expectations that it would do so; and (5) the individual leaders of CCMT.

3. Future Steps. In order to clear the way for the approval and implementation of any settlement that might emerge from the continuing negotiations, we are taking the following steps. First, because the individuals named in the two petitions filed with us were represented by counsel in that filing, we are directing that counsel send a copy of this Memorandum and Order to each of the Petitioners, including both those whose intervention we approved and those (from both the first and second Petitions) whose intervention we did not previously need to pass upon. In that fashion, they will each be PUT ON NOTICE that, if a settlement is reached, it is our intent to allocate to them a relatively short time thereafter to indicate their approval or disapproval thereof.

⁸ We would not expect any issue to arise as to the Company's signatories. For its part, the NRC Staff has not been participating in the negotiations (Staff approval of a settlement would thus be required only insofar as the Staff would have to exercise its regulatory authority to pass judgment on any requested license amendments that would implement any negotiated design changes) (see our unpublished Memorandum and Order of May 28, 2004, p. 4).

⁹ According to the information provided us, those other petitioners' residences ranged from just under a half-mile to over three miles from the facility, with most clustered from five-eighths to three-quarters of a mile away.

In the course of transmitting this document to all the Petitioners, counsel is hereby directed to confirm that each such person remains (1) a resident of the neighborhood and (2) interested in participating in the case. Counsel shall report to us, not later than Friday, July 16, 2004, the results of all such queries.

Those Petitioners whose intervention was granted (and who respond to the two questions positively) are HEREBY ADVISED that they should take prompt steps to familiarize themselves with the details of the negotiations. Those whose petitions are pending (and who respond to the two questions positively) are HEREBY ADVISED that they should take prompt steps to become generally familiar with the progress and status of the case before us.

The steps outlined in the preceding paragraph should be taken to put all Petitioners in position to decide, in a short time frame after the negotiators (1) arrive at a settlement (if indeed they do) and (2) inform Petitioners of its terms, whether to endorse such settlement or not. They will also be asked at that time to indicate, if they do not endorse the settlement, whether they are prepared, without CCMT's support, to proceed on their own herein with their stated opposition to the facility, recognizing the financial and other burdens that will be involved in directing the litigation and in funding the assistance of legal counsel and technical expertise.

It is not the purpose of the steps outlined above to preclude any Petitioner who has (or is later found to have) standing from exercising his/her rights to pursue this litigation. Rather, their purpose is to pave the procedural way for the adoption and implementation of a settlement (if one is negotiated by, and acceptable to, those who have been most active in opposing the

facility) unless there remain those not only with standing, but also with the will, the commitment and the wherewithal, to pursue that opposition rather than to accept a settlement.

It is so ORDERED.

BY THE PRESIDING OFFICER

/RA/

Michael C. Farrar
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 28, 2004

Copies of this Order are being sent by Internet e-mail transmission to counsel for (1) CFC; (2) Intervenors; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (REGARDING POSSIBLE SETTLEMENT) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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

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

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

Administrative Judge
Paul B. Abramson, Settlement Judge
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Jack R. Goldberg, Esquire
Stephen H. Lewis, Esquire
Laura C. Zaccari, Esquire
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Robert J. Sugarman, Esquire
Sugarman & Associates, PC
Robert Morris Building - 11th Floor
100 North 17th Street
Philadelphia, PA 19103

Anthony J. Thompson, Esquire
Christopher S. Pugsley, Esquire
Law Offices of Anthony J. Thompson, P.C.
1225 19th Street, NW, Suite 300
Washington, DC 20036

Mr. James Wood
President
CFC Logistics, Inc.
400 AM Drive
Quakertown, PA 18951

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of June 2004