UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-05-01

ATOMIC SAFETY AND LICENSING BOARD PANEL
Before Administrative Judges:

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)	January 11, 2005

MEMORANDUM AND ORDER TERMINATING PROCEEDING
IN AFTERMATH OF SETTLEMENT AGREEMENT

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 equipment is designed to operate underwater, employing cobalt-60 sources to irradiate food and other materials for purposes of destroying organisms that might cause spoilage of those products. The irradiator has been functioning in that mode for some time, under the license issued by the NRC Staff subject to the outcome of this proceeding.[1]

Our unpublished June 28, 2004 Memorandum and Order anticipated this litigation might be settled as a result of the intensive negotiations then being conducted by our Licensing Board Panel colleague Paul Abramson, who at our request for a Settlement Judge had been appointed to serve in that capacity . On the first page of that Order, we alerted all those Petitioners [2] "who have not been directly involved in the negotiations" as to "the procedures that will be followed to

[1] See LBP-03-16, 58 NRC 136, 137 (Sept. 23, 2003), denying the residents' motion to stay the effectiveness of the license.

[2] For reasons we explained in that same Order (at 3, nn. 3-4 and accompanying text), only a few Petitioners (those who lived closest to the facility) had been formally admitted into the proceeding as Intervenors, for we anticipated that the others could participate through them.

obtain their approval -- or to allow them to pursue their disapproval -- if a settlement is indeed reached by the negotiators." To that end, we instructed their counsel (Order, p. 5) to provide all Petitioners an update that included a copy of our Order. That step was taken for the express purpose of putting Petitioners "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" (ibid., uppercase and emphasis deleted).

There have been a number of developments since then, including the endorsement of a Settlement Agreement by some of the participants and the determination by others not to pursue their opposition. In this Memorandum and Order, we address those developments and their consequences, which include today's dismissal of all the remaining Petitioners and the formal termination of the proceeding.

A. Settlement Approval and Followup Framework. The settlement process eventually yielded a Settlement Agreement, dated August 23, 2004, between the Company and certain individuals. When that Agreement came before us for approval, we issued a decision (LBP-04-24, 60 NRC __)(Nov. 4, 2004) that:

> (1) approved the Settlement Agreement (60 NRC at __, slip op. at 5-9);[3]
>
> (2) established a procedural framework for possible further proceedings involving non-settling Petitioners (60 NRC at __, slip op. at 9-12, 24-27); and
>
> (3) dismissed one non-settled substantive issue (financial assurance) from further consideration (60 NRC at ___, slip op. at 19-24).

As to the other substantive "areas of concern" that we had previously ruled would be proper subjects of an evidentiary hearing (see LBP-03-20, 58 NRC 311, 329-33 (Oct. 29, 2003)), we

---

[3] The entire Agreement is reprinted in Appendix A to LBP-04-24, 60 NRC at ____. As we summarized its key provisions, they provided the facility opponents with two principal features they wanted installed at the facility: (1) "a backup generator to provide a continuous power supply for the pump that drives the air flow through the chamber containing the cobalt-60"; and (2) "a light-beam trip-switch to trigger an audible and visual alarm if a cask containing a replacement cobalt source is positioned so that it will traverse over the existing sources." 60 NRC at ____, slip op. at 7 (emphasis in original).

set out on November 4 a detailed framework for how and when the merits of such issues were to be addressed by any Petitioners who wanted to pursue them. See 60 NRC at ___, slip op. at 16-18; n. 43 (p. 24); 26-27; and Appendices C through F.

Under the procedural framework we established (see # 2 above), those Petitioners who had not participated in the settlement negotiations, and thus had not signed the Settlement Agreement, were (having been alerted in early July to become conversant with the matter) simply to notify the Presiding Officer by November 18, through counsel, as to whether they either:

(1) supported the settlement and would withdraw from the litigation, or

(2) objected to the settlement and would continue with the litigation.

60 NRC at ___, slip op. at 10-11, 25. Those not heard from were to have their Petitions dismissed for non-prosecution. Id. at 10, 25.

Our November decision also dealt with the question -- previously left open (see n. 2, above) -- of the various Petitioners' "standing" to participate. We there held that any who lived within 3/4 of a mile from the facility would be presumed to have standing by virtue of their proximity (id. at 12-15). Those who lived farther away (i.e., outside the foregoing 3/4 mile "presumptive standing" zone) were given until December 2 to make a factual demonstration to establish their standing (id. at 15-16, 25-26).

We made it clear that "[i]f it turns out that no Petitioner has both the interest and the standing to proceed, . . . this matter will be dismissed." Id. at 26. With that in mind, we had said at the outset (id. at 1) that "[d]epending on the situations of [the] remaining participants, and the choices they make, the future course of the proceeding can vary widely -- ranging from withdrawal of the litigation altogether, to an evidentiary proceeding on the merits of particular concerns."

B. Nature and Consequences of Responses. Responses to our November 4 ruling were sparse. A small number of Petitioners indicated that they support the settlement. More important for present purposes, no Petitioners came forward in the time specified to say that they oppose the settlement and want to continue with the litigation. [4]

With both the November 18 and December 2 filing dates having come and gone,[5] it is now appropriate to take the step foreordained in our November 4 Order and dismiss for non-prosecution the pending Petitions of all those who did not respond within those time frames, as they were obligated to do if they were desirous of continuing this litigation.[6] This step leaves no one remaining as an active litigant opposing the facility, and thus the license issued by the NRC Staff (see n. 1, above, and accompanying text) will remain in force.

C. Participants' Contributions. In thus terminating the proceeding, we think it appropriate to take note of the special efforts of a number of Petitioners and other concerned residents that led first to the challenge to the facility's being licensed, and later to the success of

---

[4] On November 18, Petitioners' counsel advised that, of the few Petitioners he had heard from, all were withdrawing but one, whose intentions were left in doubt. On November 22, Petitioners' counsel submitted a "party list" but, in response to our inquiry, explained on November 24 that he had had no word from any Petitioners who were seeking to proceed. As it turned out, the "party list" largely coincided with those who supported the settlement. One person was mentioned in counsel's communications as possibly wanting to continue, but she too did not file with us by November 18 any indication that she indeed wanted to continue; even had she done so, she would (because she lives outside the 3/4 mile presumptive-standing zone) have had to file with us by December 2 a demonstration as to her standing, a step she also did not take.

[5] We note that neither were any responses (belatedly) received after those dates.

[6] In dismissing so many Petitioners for non-prosecution, we are not being critical of them for not responding within the assigned time. Nor are we making any assumptions about the position(s) they now hold about the licensing of the CFC facility. To the contrary, we had anticipated that some might no longer be opposed but not want to actively support the settlement (60 NRC at ___, slip op. at 10), while others might remain opposed but find that it was not worth the effort, or that they lacked the wherewithal, to continue the litigation against the facility (June 28 Order at 6-7). Whether it was one of those reasons, or some other one, that led different Petitioners not to respond is not of significance to the outcome now reached.

the settlement process (suggested by the Presiding Officer[7]) and to the adoption of the Settlement Agreement (facilitated by Judge Abramson). A number of those community leaders -- who had previously put significant effort into the intellectual development of, and the financial support for, positions, documents and arguments opposing the facility -- participated in a series of meetings at which, Judge Abramson advises, their opposition position was tenaciously advanced. That the Settlement Agreement was eventually endorsed by the Intervenors who live closer to the site than any other Petitioners, and by an individual whose dedication was manifested by his willingness to support the community's effort financially, provides a testament to the settlement process itself and to the legitimacy of the outcome it yielded.

The Company also deserves credit for its participation in the settlement process. Believing that it had a strong case that could survive the formal test of litigation (see reference in our unpublished March 15, 2004 Order, p. 1), it nonetheless saw the value of informally listening to the concerns of its neighbors and to sharing with them additional information about the facility. Judge Abramson's sense, as now conveyed to us, is that the Company's approach, including its willingness to make facility changes it did not believe were essential, and to give the Petitioners further information regarding the facility and its operation, provided those who signed the Settlement Agreement the reassurance they needed to withdraw their opposition.

As may thus be seen, the Commission's longstanding policy of encouraging settlement (see 10 C.F.R. § 2.759 [former Rules] and § 2.338 [current Rules]) not only can lead to reducing

---

[7] See Aug. 7, 2003 Tr. at 84-85, noting informal off-the-record discussion regarding settlement; LBP-03-20, 58 NRC at 336 (Oct. 29, 2003), formally indicating a desire to explore the possibility of a settlement between the parties; and Dec. 11, 2003 pre-hearing conference Tr. at 415-24, elaborating on settlement theories and possibilities.

After the Settlement Judge was appointed, we continued to encourage the parties to avail themselves of the opportunity thus presented to them. See March 23, 2004 Tr. at 495-96, 528, referring to "a path to settlement that serves the needs of the citizens to be assured that . . . this facility in its present condition or a modified condition is not a threat to them . . . ."; and our unpublished May 28, 2004 Memorandum and Order at 4, n. 7, "again encourag[ing] each of the parties," prior to the first joint meeting with Judge Abramson, "to look for the advantages settlement might confer upon it, compared to the less desirable outcomes that might emerge from pursuing this litigation."

the costs and burdens of litigation, but can also bring more satisfying outcomes than those produced by litigation, allowing both sides to a controversy to reconcile their philosophical differences by reaching mutually agreeable practical resolutions (see n. 3 and this Section C , above). Unlike litigation, which can leave underlying disputes among the parties festering even after a decision producing "winners" and "losers" is rendered by an adjudicator, settlement produces a result shaped by, and acceptable to, the parties themselves, and is thus more likely to yield a harmonious future for all involved. [8]

---

[8] From the perspective of this Presiding Officer, there are also two lessons that can be learned from this proceeding. The first is the importance -- as the Commission recently has reiterated (see NRC Strategic Plan, NUREG-1614, Vol. 3, Part III ("Openness") (Aug. 2004)) -- of effective public outreach and communication as an adjunct to the agency's technical oversight of nuclear reactor and materials safety. In this instance, the agency's lack of public notice of the proposed CFC licensing action at the outset, in conjunction with its public interactions outside the adjudicatory process that apparently provided the impression there was a preordained result relative to the CFC licensing request, may well have had the effect of precipitating or promoting resident opposition (see 58 NRC at 138, n. 4 and accompanying text; 139, text accompanying nn. 6-7; and 148, n. 19 and accompanying text). The hearing process established under the Atomic Energy Act is a vehicle to permit members of the public to seek a resolution of their concerns about the health, safety, and environmental impacts of a proposed licensing action, and that process operates most fairly and effectively when those who seek to utilize it have the benefit of accurate information regarding the agency's licensing review system and its possible outcomes.

Also apparent from this proceeding is the critical role that can often be played by a Presiding Officer or Licensing Board as the initiator of discussions among the parties regarding the possibility of reaching a settlement on some or all of the matters in contest. To be sure, the Commission's decision in Rockwell International Corp. (Rocketdyne Division), CLI-90-05, 31 NRC 337 (1990), might have been read as discouraging those responsible for making a "merits determination" from doing anything other than suggesting that the parties consider settlement and then passively awaiting their response affirming their willingness to move forward. But this interpretation seemed too narrow in light of the practical considerations that generally surround any adjudication, in particular the common concern of one or more of the parties that a willingness even to suggest settlement discussions will be seen as a sign of weakness that will only encourage an opposing party to pursue the litigation. In this instance, our persistence in raising the question of settlement, and in providing the parties with suggestions about possible avenues to explore in such discussions (see n. 7, above), appears to have been an important factor in convincing CFC and a number of interested members of the local community to sit down and, utilizing Judge Abramson's good offices, to discuss -- and ultimately to address -- those individuals' concerns in a satisfactory way. As this case demonstrates, presiding officer encouragement toward settlement that is reasonably and responsibly offered can be of significant benefit to the settlement process, both under the Commission's creative Rockwell Settlement Judge precedent (which applied to this case), and its recent codification in 10 C.F.R. § 2.338 (which will govern future cases).

D. Conclusion. We can summarize the proceeding's termination as follows. All the Petitioners who came before us (both admitted Intervenors and potential ones) have taken one of the steps listed below:

(1) signed the Settlement Agreement;

(2) signed a statement indicating support for that Agreement; or

(3) elected, through inaction and for whatever reason, not to pursue any further the petition and the "areas of concern" contained therein.

Accordingly, all the petitions of those in the third category are DISMISSED FOR NON-PROSECUTION, and -- with no facility opponents remaining active -- this litigation against the issuance of the NRC license and the operation of the facility thereunder is thus TERMINATED.

As a result, the underlying issues addressed by the previously-approved Settlement Agreement -- recommended to us by Judge Abramson, as the product of extensive negotiations which he guided -- will not be litigated before us, nor will any other "areas of concern" submitted by the Petitioners and previously designated by us as appropriate subjects of an evidentiary hearing. Because the settlement process served the public interest, we repeat (see 60 NRC at ___, slip op. at 27) that "[t]hose who participated in the negotiations have our appreciation for working diligently to resolve the controversy between the Company and the community in which it is located." See also § C, above.

Pursuant to 10 C.F.R. § 2.1251(a), this Order terminating the proceeding will constitute the FINAL ACTION of the Commission within thirty (30) days of this date unless a petition for review is filed in accordance with 10 C.F.R. § 2.786(b), or the Commission directs otherwise.

Recognizing that (because the termination is for non-prosecution) we had before us in bringing an end to the proceeding no participant filings of an adversarial nature, we nonetheless hereby advise all participants, pursuant to 10 C.F.R. § 2.1253, that WITHIN FIFTEEN (15) DAYS after service of this termination decision (which shall be considered to have been served by regular mail for the purpose of calculating that date), any party may file a PETITION FOR REVIEW with the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). The filing of a petition for review is mandatory in order for a party to have exhausted its administrative remedies before seeking judicial review. 10 C.F.R. § 2.1253.

WITHIN TEN (10) DAYS after service of a petition for review, any party to the proceeding may file an ANSWER supporting or opposing Commission review. 10 C.F.R. § 2.786(b)(3). The petition for review and any answers thereto shall conform to the requirements of 10 C.F.R. § 2.786(b)(2)-(3).

It is so ORDERED.

BY THE PRESIDING OFFICER

/RA/

_____
Michael C. Farrar
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 11, 2005

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