

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

NUCLEAR FUEL SERVICES, INC.)

AND)

NEW YORK STATE ENERGY RESEARCH)
AND DEVELOPMENT AUTHORITY)
(Western New York Nuclear)
Service Center))

Docket No. 50-201 OIA



APPEAL OF ORDER ON REQUEST FOR HEARING

Pursuant to 10 CFR §2.714a, Dr. Irwin Bross appeals the order dated April 30, 1982 by Docket No. 50-201 wholly denying his request for a hearing. Dr. Bross requests that his hearing request be granted in whole or in part and by the filing of this Notice of Appeal and Supporting Brief with the Atomic Safety and Licensing Appeal Board within ten days after service of the order (May 3, 1982). It is Dr. Bross' contention that the order contains an error that deprives him and his fellow citizens of Western New York of financial and health protection without due process. The Supporting Brief is attached.

Respectfully submitted,

Irwin Bross
Irwin D.J. Bross, Ph.D.
Buffalo, New York

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Dated: May 7, 1982

SUPPORTING BRIEF FOR
APPEAL OF ORDER OF APRIL 30, 1982

Dr. Irwin Bross contends that an error in the order of April 30, 1982 deprives him (and his fellow Western New Yorkers) without due process of health and financial protections currently enjoyed.

Since the error is in the ruling on Change 32 rather than the ruling on Change 31, the brief will primarily address the request for a hearing on Change 32. Dr. Bross accepts the Board statement on page 12, line 12 "Thus, the matter which Dr. Bross seeks to litigate would be the same under either Change No. 31 or 32". In the light of this statement, all the materials and arguments and other supporting information previously submitted by Dr. Bross in his original request (which involved Change No. 31) would be applicable in his request for a hearing on Change No. 32.

The Board on Docket No. 50-201 OLA "finds that it lacks jurisdiction to consider the claims of Dr. Bross regarding the conduct by DOE of a radioactive waste management demonstration project." It should be noted that (1) this is the sole basis for denial of the hearing and if it is invalidated the hearing should be held as part of the due process in this matter, and (2) that this argument with respect to jurisdiction in the order applied only to Change 31.

While Dr. Bross does not necessarily agree with or accept the arguments with respect to jurisdiction that commence on page 13 and

extend through page 21 with numerous citations and footnotes, he does acknowledge that the carefully documented research and closely reasoned arguments would be difficult to countervene with respect to Change 31 (but only to Change 31). Moreover, it is Dr. Bross' contention that these arguments do not apply to Change 32 or to the jurisdiction of NRC with respect to this change.

While it might be argued that the consideration of the West Valley Act were such as to encompass Change 31 since this change directly involves the Department of Energy, this cannot be argued for Change 32. The circumstances and structure of Change 32 arose from actions by Nuclear Fuel Services Inc. which were not envisioned or expected during the deliberations of the West Valley Act and which only occurred after the passage of the act. Hence, Change 32 does not directly involve the Department of Energy as a principal and would be implemented before the West Valley Act took effect. Change 32 involves two principals which are separate and distinct from DOE. This is evidenced in the circulated material for Docket No. 50-201 where there have been some disparities and disagreements. The West Valley Act does not cover transactions involving only these two principals and the NRC.

The question of whether NRC has jurisdiction to consider the claims of Dr. Bross regarding the conduct by DOE of a radioactive waste management demonstration project is therefore not addressed in pages 13 through 21 of this order insofar as Dr. Bross' request for a hearing on Change 32 is concerned. In order to deny the request on jurisdictional grounds it would be necessary to show in a separate and independent

brief that the West Valley Act covers Change 32. This was not done and probably cannot be done. Therefore the only support for denial of Dr. Bross' request for a hearing on Change 32 is a single sentence in the order on page 12 line 14:

"If we had found below that an NRC licensing board has jurisdiction to adjudicate Dr. Bross' claims regarding DOE's conduct, then we believe the Board would have been able to consider the effect of Change 32, if any, on Dr. Bross' claims pursuant to 10 CFR §2.717(b), based on our discussion above."

This sentence makes a natural but serious error that is the basis for this appeal. The error is simply that the numerical order of the Changes is not the natural temporal sequence of the Changes. In other words, despite the fact the Change 32 comes after Change 31 in the NRC listing, Change 32 must be implemented before Change 31 can be implemented in the natural sequence of events.

For brevity, the above-cited sentence will be referred to as the "Key Sentence". There is a grammatical point about this Key Sentence that is undeniable: It is a conditional sentence. In a conditional sentence there is a "prior statement" (in the IF clause) and a "posterior statement" (the THEN clause). In English prior precedes the posterior in time sequence. We do not, for instance, say "If it rains tomorrow, I will wear my coat today". This is regarded as an error.

To base the decision on a hearing for Dr. Bross on Change 32 on a jurisdictional decision on a hearing for Dr. Bross on Change 31 is clearly an error in reasoning and in English. The Key Sentence is defective. Denial on jurisdictional grounds of DOE precedence in Change 31 which involves DOE as a principal in no way precludes a hearing for Dr. Bross on Change 32 where DOE is not a principal. At the very least, if the Board wants to extend the arguments for Change 31 jurisdiction to Change 32, the onus is on them to do so. Consequently, the denial of a hearing in the order of April 30, 1982 is not for valid cause.

To try to further clarify this point, consider the matter of insurance which was the subject of a recent ruling on April 21, 1982. Until Change 32 takes effect, there can be no question but that NSF is under the previous license and that the residents of Western New York are covered by nuclear indemnity insurance. They are covered just as the residents of Pennsylvania around Three Mile Island 2 (TMI-2) were covered--luckily for them. Similarly, before Change 32 takes effect, NRC has the jurisdiction to have hearing on any issue involving the public health and safety of West Valley. This includes (if NRC so decides) the consideration of the fitness of DOE to have absolute control of health and safety aspects of a very tricky clean-up operation (much worse than TMI-2).

Hence, there can be no question that this is the status quo ante on protection of the citizens of Western New York with respect to an immediate and tangible factor like insurance coverage and to a broader (but even more important) factor like public health protection.

Now consider the sequential effects of Changes 32 and 31 on these important protections. Suppose now that Change 32 has been implemented but Change 31 is not. What is the status at this point? NYSERDA is now in possession of the site and NFS is not. However, as Dr. Bross contends, the status with respect to protection is not changed at this point.

If Change 31 is now implemented, Western New Yorkers lose both the protection of the nuclear indemnity insurance for fiscal losses from a loss-of-containment accident at West Valley and the protection of NRC oversight to safeguard their health and safety. These major deprivations would occur without due process if the order of April 30, 1982 stands.

In this event, Dr. Bross would have been denied due process because of the error in the Key Sentence that resulted in failure to give a valid cause for denial of a hearing on Change 32. On the other hand, it should be evident that until or unless Change 31 is implemented AFTER Change 32, NRC has full jurisdiction to hold any hearing that it sees fit to hold. An argument denying a hearing on Change 32 on jurisdictional grounds is clearly invalid.

Dr. Bross therefore appeals the ruling of April 30, 1982 on the grounds that he and his fellow Western New Yorkers have been deprived of protection of property and health without due process.

However, as before, he stands ready to negotiate on these matters in order to avoid unnecessary delay in the start of the cleanup of the West Valley site (which he fully supports). All that he asks is that DOE recognize NRC jurisdiction over matters affecting the public

health and safety and that the WVDP contractor carry insurance equivalent in coverage to that which Western New Yorkers now have. His purpose is to prevent the deprivation or injury which Western New Yorkers would otherwise suffer.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served as of this date by first class mail, postage prepaid, to the following:

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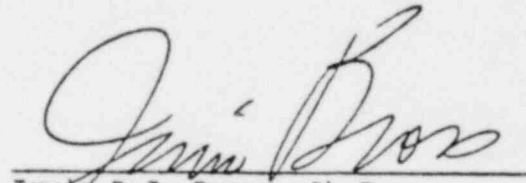
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Dated: May 7, 1982


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