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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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 OLA

BRIEF IN OPPOSITION TO DR. BROSS' APPEAL
OF THE ASLB MEMORANDUM AND ORDER
DATED APRIL 30, 1982

By its Memorandum and Order of April 30, 1982, the Licensing Board in this proceeding, inter alia, denied Dr. Irwin Bross' requests for hearings on Changes No. 31 and 32 to License No. CSF-1. By a Notice of Appeal and Supporting Brief dated May 7, 1982, Dr. Bross appealed that decision with respect to Change No. 32 to the Atomic Safety and Licensing Appeal Board. Pursuant to 10 C.F.R. § 2.714a(a), Nuclear Fuel Services, Inc. (NFS) hereby files this brief in opposition to Dr. Bross' appeal.

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I. STATEMENT OF THE ISSUE

Dr. Bross' appeal raises the issue of:

Whether the Licensing Board erred in denying, for lack of jurisdiction, Dr. Bross' request for hearing on Change No. 32 to the License, in which he seeks to raise issues regarding DOE's conduct of activities under the West Valley Demonstration Project.

II. STATEMENT OF FACTS

On September 30, 1981 the Commission, in response to an application submitted by the New York State Energy Research and Development Authority (NYSERDA) and joined by the Department of Energy (DOE), issued Change No. 31 to License No. CSF-1. The amendment authorized the co-licensees, NFS and NYSERDA, to transfer (as their interest appeared) exclusive possession of the NRC licensed portion of the Western New York Nuclear Services Center at West Valley, New York (the "West Valley facilities") to DOE in order to allow the implementation of the West Valley Demonstration Project Act, Pub. L. 96-368.^{1/}

NFS opposed the issuance of the license amendment without NFS, as licensee, having the opportunity for a prior hearing, as authorized by NRC regulations. Although Change No. 31 was, on its face, permissive, NFS was concerned that

^{1/} "West Vally Act." The purpose of the Act is to allow DOE to carry out a high-level liquid nuclear waste management project, and to decontaminate and decommission the West Valley facilities.

the Change could become mandatory if a court order forced NFS to vacate the West Valley facilities.^{2/} In that event, NFS would have been faced with undefined legal and economic consequences under the provisions of Change No. 31. NFS, therefore, filed with the NRC Commissioners a Motion to Postpone the Effectiveness of the License Amendment and a Request for Hearing. By Order CLI-81-29 dated November 6, 1981 the NRC Commissioners denied NFS's Motion, and directed the Chairman of the Atomic Safety and Licensing Board (ASLB) to establish a Licensing Board to conduct a hearing pursuant to NFS's request.

Independent of the NFS request, Dr. Bross, in a letter dated October 16, 1981, requested that the Commission hold a hearing with respect to Change No. 31. Dr. Bross questioned the ability of DOE to carry out the West Valley project and expressed concern that "misguided DOE efforts to clean up the 30,000,000 curies in Tank 8D2 could endanger the health and safety of hundreds of thousands of Western New Yorkers." In their November 6th Order the Commissioners directed that the Board conducting the hearing on the NFS

^{2/} At that time NYSERDA and NFS were involved in active litigation in the U.S. District Court for the Western District of New York concerning their contractual rights and responsibilities with regard to the West Valley facilities.

request also "review" Dr. Bross' request for hearing on Change No. 31.

After extensive negotiations between NYSERDA and NFS, the parties arrived at a proposed agreement to settle the issues outstanding between them. As part of that agreement, on February 1, 1982 NFS, joined by NYSERDA, submitted an application which would expressly terminate NFS' authority and responsibility as an NRC licensee under that license on the happening of certain events. The Commission, finding no significant hazards considerations, issued the requested amendment on February 11, 1982 as Change No. 32.^{3/} On the same day, NFS notified the Licensing Board that it was withdrawing its request for hearing on Change No. 31.

In a letter to the Licensing Board dated February 16, 1982, Dr. Bross requested a hearing on Change No. 32

^{3/} License No. CSF-1, paragraph 4.A, contemplates that the Commission may issue amendments, because of changes in the relationship between NFS and NYSERDA, to reflect "the future responsibilities of NFS and [NYSERDA] with respect to satisfying Commission regulatory requirements." Effective as of October 1, 1980 DOE and NYSERDA entered into an agreement whereby NYSERDA agreed to transfer to DOE exclusive possession of the West Valley facilities, and assumed 1) an obligation to accept the facilities on completion of the DOE project, and 2) to apply for any license required by the Commission. Change No. 32 expressly recognizes that once certain of the conditions of Change No. 32 have been met NYSERDA has the sole obligation to apply for and be responsible for any license requirements imposed by the Commission with respect to the possession and use of the West Valley facilities.

"together with or separately from the hearing on the previous amendment." The reason given by Dr. Bross for the request was his belief that Change No. 32 "would accelerate the onset of these documented hazards"; i.e., those which would be caused by DOE's management of the project under the authority of the West Valley Act.

The Board's Memorandum and Order of April 30, 1982 granted NFS' withdrawal of its request for a hearing, and found that the Board lacked jurisdiction "to consider the claims of Dr. Bross regarding the conduct by DOE" in carrying out its functions under the West Valley Act, and hence denied his requests for hearing on Changes No. 31 and 32. Dr. Bross appealed from that Order on May 7, 1982.

III. ARGUMENT

Dr. Bross in his appeal contends that the Licensing Board erred in denying his request for hearing with respect to Change No. 32. Dr. Bross acknowledges that "it would be difficult to countervene [the Board's reasons for denying his request for hearing] with respect [sic] to Change 31 (but only Change 31)."^{4/} Yet, it is apparent that his appeal is not based on any inadequacy in Change No. 32, but rather is merely an effort to circumvent the Board's finding that it lacks jurisdiction over DOE's conduct of the West

^{4/} Bross Supporting Brief at 2.

Valley Project. Indeed, "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 31 or Change 32'." See Supporting Brief for Appeal of Order of April 30, 1982 at 1.

Dr. Bross has consistently maintained that "the crux of the issue ... is the removal of the protection of NRC oversight on matters of public safety,"^{5/} since he alleges that "the record of DOE in the area of protecting the public health and safety" demonstrates "that DOE is entirely unfit to discharge this responsibility."^{6/} In his brief, Dr. Bross concluded by stating (p. 5):

... [Dr. Bross] stands ready to negotiate on these matters to avoid unnecessary delay in the start of the clean up of the West Valley site. ... 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. ... (Emphasis added.) ^{7/}

^{5/} Bross letter to Samuel Chilk, NRC, dated December 14, 1981, at 1.

^{6/} Id. at 2. See also Dr. Bross' letter of January 29, 1982, to the Licensing Board. ("the main danger to the public health and safety comes from DOE's insistence on 'exclusive responsibility in this area'" i.e., exclusive responsibility for public health and safety.)

^{7/} With respect to Dr. Bross' concern regarding nuclear indemnity insurance, the public is protected against injury or loss due to a nuclear incident while DOE is in possession of the West Valley facilities. Pursuant

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Dr. Bross is laboring under the illusion that "Change 32 must be implemented before Change 31 can be implemented."^{8/} This is incorrect. Change No. 31 was implemented on February 25, 1982 when DOE assumed exclusive possession of the West Valley facilities. On the other hand, implementation of Change No. 32 is subject to three conditions: 1) acceptance of surrender of the facility by NYSERDA, 2) assumption of exclusive possession by DOE, and 3) occurrence of the "Settlement Date" specified in a court-approved settlement agreement between NFS and NYSERDA. While the first two conditions have occurred, the third has not. Thus, since Change No. 31 has already been implemented and DOE possesses the West Valley facilities, the implementation or non-implementation of Change No. 32 has no bearing on the implementation of Change No. 31.^{9/}

to the Price-Anderson Act, 41 U.S.C. § 2210, the DOE contract with its West Valley contractor contains a provision whereby DOE will indemnify any person who has public liability for a nuclear incident. This is a matter which is governed by the Price-Anderson Act, and Mr. Bross' remedy lies with the Congress and not the Licensing Board.

8/ Bross' Supporting Brief at 3.

9/ Since the issues raised and the relief sought by Dr. Bross under Change No. 32 are outside NRC's jurisdiction, the Appeal Board need not even reach the question of whether the Licensing Board had jurisdiction to consider the request for hearing on Change No. 32. Although the result would not be affected, it should be noted for the record that the Licensing Board incorrectly concluded that it could review Dr. Bross' request for hearing on Change No. 32. (Board Decision

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Dr. Bross' appeal evidences a misunderstanding of the relationship, or lack of relationship, between Change No. 31 and 32. Dr. Bross contends that while under the terms of the West Valley Act the Commission may not have jurisdiction over DOE's conduct of the West Valley Project:

"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.... The West Valley Act does not cover transactions involving only these two principals and the NRC. 10/

Dr. Bross obviously sees his challenge to Change No. 32 as an end-run around the Commission's lack of jurisdiction over DOE's conduct of the project. He accepts the Board's statement that "the matter which Dr. Bross seeks to

at 12.) This request was not properly before the Board. The Board was not authorized to review that request, and Change No. 32 was not related to the subject matter of Change No. 31 within the meaning of 10 C.F.R. § 2.717(b). NFS' request for hearing on Change No. 31, which was the matter referred to the Board by the Commission, challenged the conditions of Change No. 31, (e.g., NFS' residual responsibilities; the exclusivity of DOE's control; the authority to suspend NFS' Price-Anderson indemnity agreement, etc.), and not the conditions for license termination which are the subject of Change No. 32. Moreover, contrary to the Board's determination, all of the preconditions for Change No. 32 have not occurred, and Change No. 32 has not been implemented. Change No. 31 has been implemented, and it is simply incorrect to conclude, as the Board did, that Change No. 32 granted the very relief sought by NFS in its request for hearing under Change No. 31.

10/ Bross' Supporting Brief at 2.

litigate would be the same under either Change No. 31 or 32."^{11/} Yet he apparently thinks that by challenging only Change No. 32 he can effectively deny implementation of Change No. 31, which is the only amendment of concern to him since it allowed DOE to obtain exclusive possession of the West Valley facilities. As discussed above, however, Change No. 31 has already been implemented. Even if Dr. Bross obtained a hearing on Change No. 32, this would in no way affect Change No. 31.

Apart from his mistaken belief that Change No. 32 is a prerequisite for Change No. 31, Dr. Bross has presented no grounds to support a request for hearing on Change No. 32. His appeal seeks only to have the Commission exercise control over DOE's conduct of project activities under the West Valley Act. For the reasons stated in the ASLB Memorandum and Order, the Commission lacks jurisdiction over this issue and the West Valley Act "precludes a formal hearing with respect to DOE's conduct of the project itself."^{12/}

IV. CONCLUSION

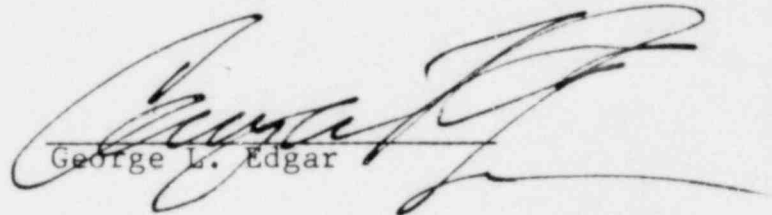
Dr. Bross' requests for hearings on Changes No. 31 and 32 pertain solely to his concerns regarding DOE's activities in conducting the West Valley demonstration project,

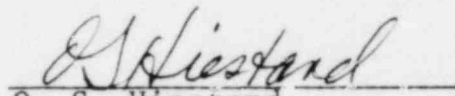
^{11/} Id. at 1.

^{12/} ASLB Memorandum and Order of April 30, 1982 at 21.

and attempt to have the Commission exercise control over those activities. The Commission lacks jurisdiction to consider claims regarding DOE's activities under the West Valley Act.

Accordingly, NFS submits that Dr. Bross' appeal of the Licensing Board's Memorandum and Order, dated April 30, 1982, should be denied.


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Dated: May 21, 1982

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	Docket No. 50-201
)	Provisional Operating
NUCLEAR FUEL SERVICES, INC.)	License No. CSF-1

CERTIFICATE OF SERVICE


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

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