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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.)	
)	Docket No. 50-201 OLA
AND)	
)	
NEW YORK STATE ENERGY RESEARCH)	
AND DEVELOPMENT AUTHORITY)	
(Western New York Nuclear)	
Service Center))	

BRIEF OF THE AUTHORITY
IN OPPOSITION TO APPEAL
OF
IRWIN D.J. BROSS

Mr. Irwin D. J. Bross has filed an appeal, served by mail on May 7, 1982, from the Atomic Safety and Licensing Board's ("ASLB") Memorandum and Order ("Order") dated April 30, 1982, in this proceeding, which denied Mr. Bross' request for hearing with respect to Change No. 32 to License No. CSF-1. By this brief filed pursuant to 10 CFR §2.714a, the New York State Energy Research and Development Authority ("Authority") opposes Mr. Bross' appeal and urges the Atomic Safety and Licensing Appeal Board to affirm the ASLB's decision.

QUESTION PRESENTED ON APPEAL

Did the ASLB properly deny Mr. Bross' request for hearing on Change No. 32, where the matters on which Mr. Bross sought to be heard were

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beyond the subject matter jurisdiction of the Commission for formal licensing hearings?

STATEMENT OF THE CASE

This proceeding flows from the August 14, 1981, application of the Authority, joined by the U.S. Department of Energy ("DOE"), for an amendment to License No. CSF-1 authorizing the two licensees--the Authority and Nuclear Fuel Services, Inc. ("NFS")--to transfer possession of the licensed facility to DOE for the purpose of carrying out a high-level radioactive waste management demonstration project ("Project") pursuant to the West Valley Demonstration Project Act, Pub. L. No. 96-368. On September 30, 1981, the Commission staff issued such an amendment (Change No. 31), effective immediately, pursuant to 10 CFR §2.106. Among other things, Change No. 31 suspended the respective authority and responsibilities of NFS and the Authority under the license during the DOE Project, on certain conditions.

For its own purposes, however, NFS wished to have its license authority and responsibilities terminated at once. Failing in its attempt to provide for termination by modification of the license amendment the Authority sought, on October 13, 1981, NFS submitted to the Commission a request for a hearing on Change No. 31, challenging the conditions that would apply to NFS upon the transfer of the facility to DOE permitted by Change No. 31.

As a matter entirely independent of NFS's October 13th request for hearing on Change No. 31, on October 15, 1981, Mr. Irwin D.J. Bross also requested a hearing related to Change No. 31. Mr. Bross' request for hearing, however, was grounded upon his concerns over DOE's activities in carrying out the Project. The Commission's staff explained in detail

the nature of Mr. Bross' hearing request and its independence from NFS's hearing request: 1/

At the outset, it is important to emphasize that the requests of NFS and Dr. Bross are entirely distinct. The issues raised by NFS relate to the authority of the Commission to authorize a transfer of the facility under the conditions set forth in Amendment No. 31 and the responsibilities of NFS as licensee after transfer of the facility to DOE. The NFS request does not address the activities to be carried out by DOE or any risk to the health and safety of the public that may result from DOE's conduct of the project.

By contrast, the request filed by Dr. Bross deals exclusively with his concern, "as a resident and a health bureaucrat," that DOE's activities "could endanger the health and safety of hundreds of thousands of Western New Yorkers." This request is not, in form, a request for leave to intervene, nor is there the slightest indication that Dr. Bross has any interest in the issues which NFS has sought to be adjudicated. 1/

1/ If the request of Dr. Bross were treated as a motion for leave to intervene, the NRC staff would oppose it for failure to satisfy the requirement that the petition set forth, with particularity, the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceedings, and the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene. 10 CFR § 2.714(a)(2). Setting aside the complete absence of any particular showing of interest other

1/ NRC Staff Response to Request of Dr. Irwin D.J. Bross for Hearing 2-3 (November 27, 1981).

than the vague assertion that Dr. Bross is "a resident and a health bureaucrat," the request points to no aspect of the subject matter of the proceeding as to which intervention is sought. The subject matter of the hearing requested by NFS relates to the conditions under which a transfer of a facility is to be authorized; Dr. Bross asserts no interest in the transfer, but is instead concerned about the subsequent use and possession of the facility by DOE. Further, Dr. Bross fails to explain how a resolution of the issues raised by NFS--for example, changes in the subsequent responsibilities of NFS--would affect any of the interests which he asserts.

On November 6, 1981, the Commission issued an order [CLI-81-29, 46 Fed. Reg. 56081 (Nov. 13, 1981)], which also treated NFS's and Mr. Bross' requests for hearing as entirely separate matters. The Commission first directed the establishment of a Licensing Board "to conduct an adjudicatory hearing...pursuant to the request of NFS (emphasis added)." In addition, the Commission instructed the Board only "to review Dr. Bross' request for a hearing (emphasis added)." 46 Fed. Reg. 56082. The ASLB found that Mr. Bross' request for hearing on Change No. 31 "is addressed to issues other than those raised by NFS. As such, it is an independent request for a hearing, not a petition to intervene in the hearing granted to NFS." [Order at 13 n. 16.] Mr. Bross has not challenged that ASLB finding.

On February 1, 1982 NFS filed a request for license amendment, to provide for termination of NFS's authority and responsibility under License No. CSF-1, effective only upon and after three conditions have been fulfilled: (1) acceptance of surrender of the facility by the Authority from NFS; (2) transfer of possession of the facility to DOE pursuant to the provisions of Change No. 31; and (3) occurrence of the Settlement Date of a settlement agreement among NFS, Getty Oil Company, and the Authority in litigation pending in the U.S. District Court for the Western District of New York. The Authority responded in support of

such an amendment. On February 11, 1982, the NRC staff issued Change No. 32, comprising the requested amendment.

By letter dated February 16, 1982, Mr. Bross requested a hearing with respect to Change No. 32. Mr. Bross' letter request did not raise any issue whatsoever with respect to the subject matter of Change No. 32--that is, the potential termination of NFS's authority and responsibility under the license. Rather, Mr. Bross' identified concerns were, again, directed solely to DOE's activities in carrying out the high-level radioactive waste management project.

Since then, the Authority has accepted surrender of the licensed facility from NFS, effective upon transfer of possession of the facility to DOE. On February 25, 1982, NFS voluntarily transferred exclusive possession of the facility to DOE pursuant to Change No. 31. The Settlement Date in the Settlement Agreement, Stipulation, and Order among the Authority, NFS, and Getty Oil Company has not occurred yet, however, and so NFS's authority and responsibility under the license have not yet been terminated pursuant to Change No. 32.

DOE is currently in possession of the facility and is proceeding to carry out the Project. As required by Pub. L. No. 96-368, DOE's activities are the subject of a Memorandum of Understanding between DOE and the Commission on "Implementation of the West Valley Demonstration Project Act."^{2/} The Memorandum of Understanding provides for informal Commission review and consultation with respect to DOE's conduct of the Project, as required by Pub. L. 96-368.

^{2/} The Memorandum of Understanding is dated September 23, 1981, and was published at 46 Fed. Reg. 56960 (Nov. 19, 1981).

On April 30, 1982, the ASLB issued its Order, which did three things. First, it dismissed as moot NFS's October 13, 1981, request for hearing, which NFS had voluntarily withdrawn by filing dated February 11, 1982 (Order at 10-11, 13). Second, the ASLB denied Mr. Bross' October 16, 1981, request for hearing on Change No 31. The Board found that the Commission lacked subject matter jurisdiction to hold formal license hearings on DOE's activities in carrying out the Project, which were the subject of Mr. Bross' request for hearing (Order at 13-21.) Third, the ASLB denied Mr. Bross' request for hearing on Change No. 32, for the same reason that it denied his request for hearing on Change No. 31 (Order at 21-22).

Neither Mr. Bross nor any other participant in this proceeding has taken exception to the ASLB's actions in dismissing the NFS request for hearing and denying Mr. Bross' request for hearing on Change No. 31. Mr. Bross' appeal challenges only the ASLB's denial of his request for hearing on Change No. 32.

ARGUMENT

I. Change No. 32 is Not Material to Mr. Bross' Stated Basis for His Request for Hearing.

Change No. 32 is irrelevant and immaterial to Mr. Bross' stated interest in his February 16, 1982 request for hearing on Change No. 32. Mr. Bross did not raise any concerns or issues related to the potential termination of NFS's license authority and responsibility pursuant to Change No. 32. His stated concerns, instead, related solely to DOE's activities in carrying out the Project and to the nature and extent of the Commission's review and control of DOE's Project activities. Change No. 32 does not in any way affect how DOE will conduct the West Valley

Demonstration Project or the extent of Commission review or control over DOE's conduct. Change No. 32 merely provides for potential termination of NFS's authority and responsibility under the license in connection with a settlement of litigation involving NFS, Getty Oil Company, and the Authority.

Nor did Change No. 32 affect the conditions under which NFS was authorized by Change No. 31 to transfer possession of the licensed facility to DOE. Change No. 32 provides for termination of NFS's authority and responsibility under the license only after (among other things) transfer of the facility to DOE pursuant to Change No. 31, thus assuming the prior implementation of Change No. 31--which occurred on February 25, 1982.^{3/} As noted above, Mr. Bross has not taken appeal from the ASLB's denial of his request for hearing on Change No. 31.^{4/} Accordingly, since Mr. Bross raises no concerns relevant or material to

^{3/} Mr. Bross' pleadings thus fundamentally misunderstand the relationship between Change No. 31 and Change No. 32, in that he assumes incorrectly that Change No. 32 must be implemented before Change No. 31 can be implemented. In fact, possession of the facility has already been transferred from NFS to DOE pursuant to, and upon the conditions contained in, Change No. 31; in contrast, not all of the necessary conditions for implementing Change No. 32 have yet occurred and thus NFS's license has not yet been terminated.

^{4/} Mr. Bross' brief in support of his May 7, 1982 appeal ("Bross Brief") raises, for the first time, a concern about NFS's maintenance of nuclear indemnity insurance under Indemnity Agreement No. B-29. This matter is not only untimely (with respect to both Change No. 31 and Change No. 32), but, because Change No. 31 provided for suspension of Indemnity Agreement No. B-29, also immaterial to Mr. Bross' appeal of the denial of his request for hearing on Change No. 32. Moreover, we note that, although Indemnity Agreement No. B-29 with the Commission is currently suspended, the public is still protected because DOE has extended Price-Anderson nuclear indemnification to its contractor for the Project. This, of course, was a requirement the Commission imposed in Change No. 31 as a precondition to suspension of Indemnity Agreement No. B-29.

the potential termination of NFS's license authority and responsibility pursuant to Change No. 32, the Atomic Safety and Licensing Appeal Board should deny his appeal of the ASLB's denial of his request for hearing on Change No. 32.

II. The Hearing Mr. Bross Seeks is Beyond the Subject Matter Jurisdiction of the Commission.

In his separate requests for hearing on Change No. 31 and on Change No. 32, Mr. Bross sought to litigate matters only with respect to alleged hazards to public health and safety with respect to DOE's activities in carrying out the Project. This has been the crux of Mr. Bross' concerns in every filing he has made in this proceeding. 5/ After detailed analysis of the legislative history of the West Valley Demonstration Project Act ("Act"), however, the ASLB found that Section 2(c) of the Act precludes the Commission from holding formal hearings on DOE's conduct of the Project (Order at 15-21). It therefore denied Mr. Bross' requests for hearing, not only on Change No. 31, but also on Change No. 32.

Mr. Bross does not challenge the validity of the ASLB's analysis of the legislative history of the Act. In fact, he acknowledges (Bross Brief at 1-2) "that the carefully documented research and closely reasoned arguments [in the ASLB's Order] would be difficult to countervene with respect to Change No. 31 (but only to Change No. 31)." Mr. Bross then argues, however, that the ASLB's analysis does not apply to the Commission's jurisdiction with respect to Change No. 32 because

5/ See, e.g., Bross letter of October 16, 1981, requesting hearing; Bross letter of December 14, 1981 to S. Chilk, NRC; Bross letter of January 29, 1982, to ASLB; Bross letter of February 16, 1982, to ASLB, requesting hearing.

"Change No. 32 does not directly involve the Department of Energy as a principal and would be implemented before the West Valley Act [sic] took effect." [Bross Brief at 2.]

The fact that DOE "is not involved as a principal" in Change No. 32, if anything, only emphasizes that Change No. 32 is immaterial to Mr. Bross' concerns about how DOE will conduct the Project. Mr. Bross clearly does not understand the nature of Change No. 32. Change No. 32 need not be implemented "before the West Valley Act took effect" (which was October 1, 1980); or "before Change No. 31 can be implemented" 6/ (which happened on February 25, 1982). Change No. 32 is not yet implemented and, in fact, might never be implemented. The DOE Project, nonetheless, is under way. Even if, arguendo, Change No. 32 were rescinded (for which there is no justification), Mr. Bross' concerns about DOE's conduct of the Project would not be affected in the slightest.

The key question on this appeal is not who the "principals" of the "transaction" are, 7/ but the nature of the issues Mr. Bross wishes to litigate. He concedes that "the matter which [he] seeks to litigate would be the same under either Change No. 31 or 32." 8/ The issues he raises pertain to how DOE will conduct the Project and seek NRC control over DOE's activities through formal hearings and conditions.

6/ See Bross Brief at 3.

7/ Bross Brief at 2.

8/ Order at 1, quoted in Bross Brief at 1.

Mr. Bross does not appeal from the ASLB's denial of his request for hearing on Change No. 31, which was the operative license instrument allowing DOE to take possession of the facility from NFS to carry out the Project. There can be no justification whatsoever for granting Mr. Bross a hearing on the issue he sought to litigate with respect to Change No. 31 in the guise of granting a hearing on Change No. 32, which is entirely irrelevant to DOE's conduct of the Project. As the ASLB correctly found, and Mr. Bross has not even attempted to refute, the West Valley Demonstration Project Act "precludes a formal hearing with respect to DOE's conduct of the project itself." [Order at 21.] The Commission therefore has no authority to grant Mr. Bross the relief he seeks on this appeal.

CONCLUSION

For the reasons set forth above, Change No. 32 is immaterial to, and the Commission has no authority to hold a hearing on, DOE's Project

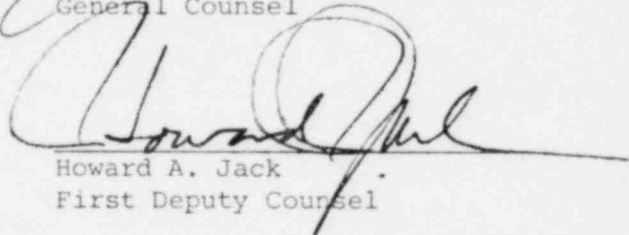
activities, the issue which Mr. Bross seeks to litigate in his request for hearing on Change No. 32. Accordingly, the ASLB's Order should be affirmed and Mr. Bross' appeal should be denied.

Respectfully submitted,

NEW YORK STATE ENERGY RESEARCH
AND DEVELOPMENT AUTHORITY



Carmine J. Clemente
General Counsel



Howard A. Jack
First Deputy Counsel

Dated: May 24, 1981
Albany, New York

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CERTIFICATE OF SERVICE

I certify that copies of the above Brief have been served as of this date by first class mail, postage prepaid, upon:

Thomas S. Moore, Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. W. Reed Johnson
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Mr. Gary J. Edles
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Warren E. Bergholz, Jr., Esq.
Office of the General Counsel
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Lawrence Brenner, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Irwin D. J. Bross, Ph.D.
Director of Biostatistics
Roswell Park Memorial Institute
666 Elm Street
Buffalo, New York 14263

Dr. Jerry Harbour
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James R. Wolf, Esq.
John F. Klucsik, Esq.
Counsel for NRC Staff
Office of the Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mr. Peter A. Morris
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Orris S. Hiestand, Jr., Esq.
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036


George L. Edgar, Esq.
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Frank K. Peterson, Esq.
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555



Howard A. Jack
First Deputy Counsel
New York State Energy Research
and Development Authority

Dated: May 24, 1982
Albany, New York