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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Lawrence Brenner, Chairman
Dr. Jerry Harbour
Dr. Peter A. Morris

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In the Matter of

NUCLEAR FUEL SERVICE, INC.,
AND
NEW YORK STATES ENERGY RESEARCH
AND DEVELOPMENT AUTHORITY

(Western New York Nuclear
Service Center)

Docket No. 50-201 OLA

February 19, 1982



MEMORANDUM AND ORDER
DIRECTING THE SUBMISSION OF POSITIONS
ON THE EFFECT OF LICENSE CHANGE NO. 32

On February 11, 1982, the NRC Staff issued an amendment (change no. 32) to the production facility operating license for the Western New York Nuclear Service Center. The amendment had been requested on February 1 by one of the present licensees, Nuclear Fuel Services, Inc. (NFS), and was agreed to (with minor modifications) by the co-licensee, the New York State Energy Research and Development Authority (NYSERDA).^{1/} The effect of the amendment is to terminate the authority and responsibility of NFS under the license, effective upon: settlement of the suit between the co-licensees in the United States District Court for the Western District of New York; acceptance of surrender of the facility by NYSERDA; and assumption of possession of the facility by the

^{1/} Letter from Counsel for NYSERDA to R. Cunningham of NRC Staff, dated February 9, 1982.

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United States Department of Energy (DOE) in accordance with the West Valley Demonstration Project Act, Pub. L. No. 96-368 and the preceding amendment (change no. 31) to the facility license.^{2/}

The request for hearing filed by NFS pending before the Board involved the opposition by NFS to permitting the transfer of the facility to DOE by virtue of the preceding change no. 31 without terminating the authority and responsibility of NFS. NFS, now having obtained the very relief it sought before this Board through the issuance of change no. 32 by the NRC Staff, has filed before the Commission a withdrawal of its request for hearing, dated February 11, 1982.

Also pending before this Board is the request for hearing on change no. 31 filed by Dr. Irwin D. J. Bross. The NRC Staff has opposed Dr. Bross' request on the grounds that the issues he raises are directed to the activities to be undertaken by DOE at the facility and that such issues may not be addressed in formal NRC licensing proceedings under the West Valley Demonstration Project Act.

In order to assist the Board in understanding the posture of this proceeding in the context of related court proceedings and matters before the Commission, and to solicit the further views of participants on questions bearing on our consideration of the requests for hearing, we directed the

^{2/}The "West Valley" act establishes a project for DOE to demonstrate techniques for the solidification and preparation for disposal of the high level reprocessing waste now being stored at the facility. The program will include decommissioning of the facilities used in the project, and transportation of the solidified waste, in accordance with applicable law, to a Federal repository for permanent disposal. §2(a).

filing of further information and issues by our order of December 31, 1981. Under the filing schedule as extended during the conference call of February 5,^{3/} the only replies to the order and to the filings of the other participants still pending are the mandatory initial response by the NRC Staff and the optional further reply by NFS, both due by March 2.^{4/} As set forth below, we are modifying the questions and asking that additional points be addressed. Accordingly, we extend the March 2 filing date to March 8.

By letters to the Board dated February 4 and 12, transmitting proposed and then issued change no. 32, Counsel for NFS and the Staff, respectively, assert without explanation in identical language that the "...amendment is not an issue before the Board." We do not know what NFS and the Staff mean by this language. However, it appears to the Board that change no. 32 certainly is related to the subject matter of this proceeding. See 10 CFR §2.717(b). Indeed, as noted above, it accords the very relief sought by NFS in this proceeding. Although for this reason NFS desires to withdraw its request for a hearing, there remains pending the request for a hearing by Dr. Bross. It may be that upon completion of our consideration of the matter, we will determine, as argued by the Staff, that Dr. Bross' concerns are foreclosed from consideration by this Board under the West Valley Demonstration Project Act, and that if so change no. 32 will not affect a determination that Dr. Bross has

^{3/} See Memorandum of Conference Call filed by Counsel for NYSERDA on February 9. The Board appreciates the detailed memorandum prepared by NYSERDA's counsel at our request.

^{4/} We have not received NYSERDA's reply to the order as of this writing, since it was not due to be placed in the mail before February 16 under the extended schedule.

no right to a hearing. However, an argument by a party that Dr. Bross would continue to have no right to a hearing after change no. 32, under its interpretation of the statute, is different from an unadorned declaration to the effect that change no. 32 could not affect issues before the Board.

The Board has not determined whether any inquiry into DOE's activities is foreclosed as we have been waiting to consider the pending submissions of the participants, particularly the Staff's response to the Board's question 4 and the responses of the Staff, and NFS, to the filings of the other participants, including the further filings by Dr. Bross.^{5/}

^{5/} It appears that the much broader view of the scope of the proceeding previously urged by NFS, particularly in its response of January 22, 1982 to the Board's questions 3 and 4, is not consistent with the Staff's and DOE's views on the preclusion of inquiry into DOE's activities. Indeed, the Board's initial research of the legislative history and our later review of a memorandum to the Commission discloses that the legislative history does not appear to be as clear and unilateral as argued by the NRC Staff and DOE. Although the views of Congressmen Ottinger and Dingell that DOE would be a co-licensee are contained in the attachment to the Staff's response to Dr. Bross of November 27, 1981, they are not discussed in the course of the Staff's legal arguments in the memorandum itself. However, the contrary views of Congressmen McCormack and Lundine are noted and quoted in the Staff's memorandum (at pp. 4-6) in support of the Staff's view that the House discussion "left no doubt" that there was to be no regulatory relationship between NRC and DOE.

The memorandum to the Commission referred to in this note is from the General Counsel, and is denoted as SECY-81-24, January 13, 1981. Since it has come to the Board's attention, we are serving it with this order for the information and use of the participants. The "SECY" memorandum contains an analysis of the West Valley Demonstration Project Act and legislative history (including the identical attachment to the NRC's Staff's response referred to in the preceding paragraph of this note). It also contains a draft letter to Congressman Dingell with a cover memorandum to the Commission on the subject of: "NRC Authority to Regulate DOE Activities at West Valley." At the time of the NRC Staff's other responses to this order, it shall advise whether the draft letter, or other similar letters dealing with whether DOE should be a licensee, were ever sent by the Commission to Congressman Dingell or other congressmen or senators. Representative copies of any such letters should be provided.

The NRC Staff, in view of the events which have occurred since the issuance of our questions on December 31, 1981, may limit its March 8 response under that order to a reply to the answers of the other participants to the order, and to the Board's questions 4 and 5. Question 4 is amended to add "and/or NYSERDA" after "NFS" ^{6/} In addition, responses shall be filed by March 8, to the following additional requests for the positions of the participants:

7. The NRC Staff, and any other participant wishing to state its views, shall explain why and to what extent change no. 32 "is not an issue before the Board." The explanation by the Staff shall include whether Dr. Bross' request for hearing, as amplified by his further filings, should be considered as being directed to change no. 32 in addition to change no. 31 and/or evaluated against the circumstances altered by change no. 32.
8. Dr. Bross and the Staff (to the extent not included in the response to the previous paragraph), and any other participant wishing to do so, shall explain whether and to what extent the issues sought to be litigated by Dr. Bross are affected by change no. 32.
9. The NRC Staff shall explain whether the terms of the Memorandum of Understanding between NRC and DOE on the "Implementation of the West

^{6/} Accordingly, Question 4, as amended, asks:

Is this Board precluded from inquiry into DOE's conduct of the West Valley Demonstration Project where such inquiry is not for the purpose of regulating or licensing DOE's activities, but rather is incidental to a determination of the present and future rights and responsibilities of NFS and/or NYSERDA?

Valley Demonstration Project Act of 1980," dated September 23, 1981 (46 Fed. Reg. 56960, November 19, 1981) were approved or ratified by action of the Commission or whether the NRC Staff officials who executed the agreement did so under general or specific delegations of authority from the Commission. What weight does the Staff, or any other participant, believe the Board should place on the terms of the Memorandum of Understanding in deciding matters before us?

10. NFS, the Staff, and any other participant wishing to comment, shall discuss whether the "Withdrawal of Request for Hearing" filed by NFS on February 11 was intended to be filed directly before the Commission as a fait accompli, with no further action by the Commission or the Board, and if so whether this is proper. See 10 CFR §2.717. What, if any, procedural effect would an approved withdrawal of the request for hearing by NFS have on the request for hearing by Dr. Bross?

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Lawrence Brenner, Chairman
Lawrence Brenner
ADMINISTRATIVE JUDGE

Bethesda, Maryland
February 19, 1982