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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
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NUCLEAR FUEL SERVICES, INC., )  
 )  
AND ) DOCKET NO. 50-201 OLA  
 )  
NEW YORK STATE ENERGY RESEARCH )  
AND DEVELOPMENT AUTHORITY )  
 )  
(Western New York Nuclear )  
Service Center) )

ANSWER OF THE AUTHORITY TO LICENSING  
BOARD ORDER DIRECTING FILING  
OF FURTHER INFORMATION



The New York State Energy Research and Development Authority ("Authority") hereby files its answers to the questions contained in the Atomic Safety and Licensing Board's ("Board") December 31, 1981, Memorandum and Order Directing the Filing of Further Information and Issues ("Order"). To the extent that the information contained in Nuclear Fuel Services, Inc's ("NFS") January 22, 1982, Answer to the Board's questions appears generally adequate and still material, the Authority will not duplicate that information; nor will the Authority respond here to any representations in the NFS Answer with which the Authority differs but which are no longer material to this proceeding. Thus, nothing in this Answer of the Authority should be construed as

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acquiescence in any representations or arguments in NFS's January 22 Answer.

QUESTION 1. What is the present status and projected schedule of the litigation between NFS and NYSERDA before the United States District Court (W.D.N.Y.) and between NFS and the NRC before the United States Court of Appeals (D.C. Circuit)? Include the same information for any other currently pending actions before the Courts or other government agencies which may be relevant to the proceeding before this Board. Include, for each currently pending proceeding, a brief summary of the issues involved and a list of the parties, and explain whether the proceeding before this Board could be rendered moot by the other proceedings.

ANSWER 1. Civil Action No. CIV-81-18E in the U.S. District Court for the Western District of New York ("District Court") was brought by the Authority against NFS and its parent corporation, Getty Oil Company ("Getty"), for, among other things, damages and specific performance for numerous causes of action for breach of contract and public nuisance. Civil Action No. CIV-81-683E is an action brought by NFS against the Authority for damages, declaratory relief, and specific performance for several causes of action for alleged repudiation and breach of contract.

Pursuant to a December 17, 1981, order of the Honorable John T. Elfvin in the District Court, NFS, Getty, and the Authority engaged in pre-trial conferences on various occasions in January and early February, 1982, before the U.S. Magistrate for the District Court. The purpose of the conferences was to discuss possible ways to expedite resolution of the parties' differences sufficiently to allow early transfer of possession of the Western New York Nuclear Service Center

from NFS to the U.S. Department of Energy ("DOE"), so that DOE could begin the high-level radioactive waste management project ("West Valley Demonstration Project") to be carried out pursuant to Pub. L. 96-386. On January 20, 1982, Judge Elfvin ordered the parties to appear before him on February 8, 1982, for the purpose of setting a date for trial of a limited issue remanded by the U.S. Court of Appeals for the Second Circuit ("Second Circuit") in a decision of December 8, 1981, in Docket No. 81-7736. Trial was to commence no later than February 16, 1982. On February 8, 1982, the parties appeared before Judge Elfvin and reported on the status of their discussions for resolving their differences pursuant to the December 17, 1981, order. At that time Judge Elfvin set February 23, 1982, as the date for commencement of trial of the issue remanded by the Second Circuit and also assumed personal authority over the continuing pre-trial conferences of the parties to resolve their differences sufficiently to allow transfer of the site to DOE.

The Authority believes that the proceedings before the District Court would not, in themselves, have rendered the proceeding before this Board moot. As explained below in our answer to Question 3, however, the pre-trial conferences of the parties have led to agreement on a procedure that has mooted the NFS request for hearing pending before this Board.

NFS has filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") seeking review of the Commission's September 30, 1981, amendment (Change No. 31) to License No. CSF-1, which was also the subject of NFS's request for hearing in this proceeding. The Authority is an intervenor-respondent in the D.C. Circuit proceeding. NFS filed its brief with the D.C. Circuit on

January 11, 1982. The Commission's brief in opposition was due on February 11, 1982. The Authority's brief is due 10 days after the Commission's brief is served.

As a result of the procedure to which the parties agreed in the pre-trial conferences before the District Court, however, on February 11, 1982, NFS filed with the D.C. Circuit a motion for voluntary dismissal of its petition for review. The Commission accordingly filed a motion for a one week extension of time to file its brief in opposition.

Dismissal of the NFS petition for review and termination of the D.C. Circuit proceeding will not moot this proceeding. If the D.C. Circuit had eventually held in favor of the Authority's position--that NFS was not entitled to a Commission hearing because the Commission properly acted in accordance with its regulations and the Atomic Energy Act and NFS failed to make a timely request for hearing--then this proceeding would have been mooted. If the D.C. Circuit had ruled in favor of NFS's position, since withdrawn, then this proceeding would not have been mooted because a hearing on those issues raised by NFS with respect to the September 30, 1981, license amendment (which would have remained issued, but not effective) would have been required.

QUESTION 2. What is the relationship to this proceeding of the NRC license amendment proposed by NFS on October 6, 1981, which is the subject of the December 10, 1981 letter to the Commission from O.S. Hiestand, Counsel for NFS? (NFS is requested to provide a copy of that amendment application to the Board). What is the current status of the NFS application for amendment? To what extent is jurisdiction over the

NFS application for amendment properly before this Board as a necessary part of the consideration of the requests for hearing delegated to the Board by the Commission's order of November 6, 1981?

ANSWER 2. The license amendment proposed by NFS on October 6, 1981, was entirely independent of the pending proceeding before the Board. The NFS request for hearing in this proceeding challenged the propriety of the conditions that Change No. 31 imposed on transfer of the licensed facility to DOE. The October 6th NFS request did not challenge those conditions, but sought termination of NFS's authority and responsibility under the license upon transfer of the facility to DOE. Thus, the October 6th proposed amendment would have provided alternative relief to that which NFS sought in this proceeding and would have removed the bases for NFS's request for hearing in this proceeding.

As noted in NFS's January 22, 1982, Answer, the NRC staff denied NFS's October 6th request for amendment, without prejudice, on January 11, 1982. Because that proposed amendment was independent of the NFS request for hearing pending before the Board here (and assumed the propriety of the conditions imposed upon transfer which NFS had challenged in this proceeding), the October 6th request was not within this Board's jurisdiction and was properly subject to action by the NRC staff.

QUESTION 3. Set forth the issues, with reasonable specificity and basis (See 10 CFR §2.714), which the participants seek to litigate in this proceeding. For each issue, indicate whether it is solely a legal issue or whether the presentation of evidence is necessary or desirable (and if so, set forth the nature of the evidence which the participant would

adduce). In addition, for each issue, the proponent shall indicate the nexus of the issue to the license amendment (change no. 31) issued by the NRC Staff [footnote omitted].

ANSWER 3. With respect to the NFS request for hearing, there are no longer any issues before the Board for decision. Through the pre-trial conferences and discussions held at the direction of Judge Elfvin in the District Court litigation, the parties there have been attempting to find a mutually acceptable set of procedures to resolve their differences sufficiently to permit expeditious transfer of the licensed facility to DOE, so that the West Valley Demonstration Project may begin. On February 1, 1982, NFS filed an application for amendment of License No. CSF-1 to provide for termination of NFS's authority and responsibility under the license, effective upon: (1) acceptance of surrender of the facility by the Authority from NFS, (2) transfer of possession of the facility to DOE pursuant to Paragraph 7 of the license, and (3) the Settlement Date of a settlement agreement among the parties to the District Court litigation. The Authority responded in support of such an amendment. (A copy of the Authority's response was served upon the Board and all participants in this proceeding.) On February 11, 1982, the NRC staff issued such an amendment (Change No. 32),<sup>1/</sup> adding a new Paragraph 8 to License No. CSF-1 in a form mutually acceptable to NFS, the Authority, and DOE.

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<sup>1/</sup> For the reasons stated in Answer 2 with respect to the October 6, 1981, NFS request for amendment, the February 1, 1982, NFS request for amendment was not subject to the jurisdiction of this Board, but was properly before the NRC staff for action.

NFS then filed with the Board a withdrawal of its request for hearing.

The issues NFS previously raised with respect to Change No. 31, which had been the subject of this proceeding, are therefore moot now.

With respect to Mr. Irwin D.J. Gross' request for hearing, the only issue properly before the Board at this time is the threshold question referred to the Board by the Commission's November 6, 1981, Order (CLI-81-29) in this proceeding; that is: should his request for hearing be granted? The Authority agrees with the NRC staff that Mr. Gross' request for hearing must be denied because it is clearly contrary to the West Valley Demonstration Project Act, Pub. L. 96-368, and beyond the subject matter jurisdiction of the Board, for the reasons set forth in the November 27, 1981, NRC Staff Response to the Request of Dr. Irwin D.J. Gross for Hearing. Nothing in Mr. Gross' subsequent filings<sup>2/</sup> explains how the Board could grant a hearing in the face of this essential deficiency. In Pub. L. 96-368 Congress explicitly provided for informal Commission review of DOE's activities in carrying out the West Valley Demonstration Project,<sup>3/</sup> rather than formal Commission

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<sup>2/</sup> The Authority never received a copy of Mr. Gross' request for hearing, and thus far has received only two filings by Mr. Gross in this proceeding--his December 14, 1981, letter, a copy of which was transmitted to the Authority by the Commission's Secretary in mid-January, 1982, and his January 13, 1982, letter, a copy of which was sent to the Authority with the Board's January 18, 1982, Order Directing That All Parties Be Served With Filings in This Proceeding.

<sup>3/</sup> In September of 1981, DOE and the Commission executed a Memorandum of Understanding for this purpose, in conformance with the system of review established by Pub. L. 96-368.

licensing proceedings. The essence of Mr. Gross' position is simply that he wishes Congress had done otherwise and provided for Commission licensing of the DOE project. But his wishing cannot confer upon the Commission or the Board jurisdiction that Congress declined to provide. The Board should, therefore, act expeditiously to deny Mr. Gross' request for hearing.

The Authority, which was the applicant for the amendment issued as Change No. 31, itself raises no issues with respect to that amendment. The amendment and the proceeding which led to its issuance were both substantively and procedurally proper in every respect.

QUESTION 4. 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?

ANSWER 4. Although the Authority believes the Board is precluded from inquiring into DOE's conduct of the West Valley Demonstration Project because DOE's activities are immaterial to the issues that NFS had raised with respect to Change No. 31, this question is now moot as a result of NFS's withdrawal of its request for hearing.

QUESTION 5. Would a prehearing conference be useful, as suggested by the Staff, after the responses to this order are filed? Are there issues which should be briefed in advance of a prehearing conference?

ANSWER 5. A prehearing conference would no longer be useful with respect to the NFS request for hearing in this proceeding, which has

now been withdrawn.

The Authority believes that Mr. Gross' request for hearing is so clearly contrary to the West Valley Demonstration Project Act and beyond the jurisdiction of the Commission and the Board that it should immediately be denied. Thus, we see no need for a prehearing conference with respect to that request. If the Board affords Mr. Gross further opportunity to brief the threshold legal issue of whether the Board has jurisdiction to hold a hearing on DOE's activities under the West Valley Demonstration Project, however, the Authority desires an opportunity to respond to Mr. Gross' brief. Any such briefing should occur prior to deciding whether to hold a prehearing conference, because a Board decision denying Mr. Gross' request for hearing would obviate a prehearing conference.

QUESTIONS 6. In general terms, and in light of the above answers, what schedule for further actions in this proceeding do the parties contemplate?

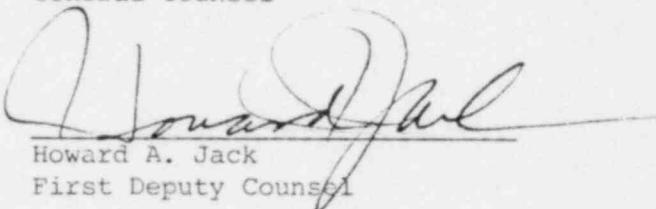
ANSWER 6. The Authority believes the Board should immediately notify the participants that this proceeding is terminated with respect to NFS's now withdrawn request for hearing. The Board should act as soon as it can to deny Mr. Gross' request for hearing. If the Board does allow Mr. Gross a further opportunity to brief the threshold legal question of whether the Commission has jurisdiction to hold a hearing on

DOE's activities under the West Valley Demonstration Project, the Authority requests three weeks for filing a response to Mr. Gross' brief.

Respectfully submitted,

NEW YORK STATE ENERGY RESEARCH  
AND DEVELOPMENT AUTHORITY

Carmine J. Clemente  
General Counsel



Howard A. Jack  
First Deputy Counsel

Dated: Albany, New York  
February 16, 1982

APPENDIX

LIST OF DOCUMENTS

Since September, 1981, the Authority has filed the following documents with the Commission:

- 10/15/81 - Response of NYSERDA in Opposition to the Motion of NFS for an Order Postponing the Effectiveness of a License Amendment and Its Request for Hearing (accompanied by transmittal letter).
- 12/3/81 - NYSERDA Notice of Appearances of Counsel.
- 12/18/81 - Letter of NYSERDA in opposition to October 6, 1981, request of NFS for amendment terminating license authority and responsibility.
- 2/9/82 - Memorandum of Conference Call.
- 2/9/82 - Letter of NYSERDA supporting February 1, 1982, request of NFS for amendment terminating license authority and responsibility upon occurrence of certain events.

The Authority has filed with the U.S. Court of Appeals for the District of Columbia Circuit the following document related to the matters pending before the Atomic Safety and Licensing Board:

- 11/19/81 - Motion of NYSERDA to Intervene As of Right.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

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

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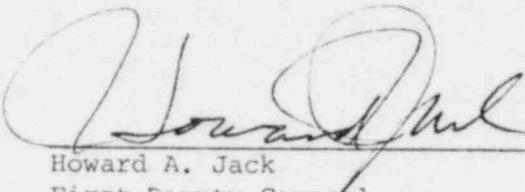
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Dated: February 16, 1982

Albany, New York