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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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



NFS' RESPONSE TO LICENSING BOARD'S MEMORANDUM
AND ORDER OF FEBRUARY 19, 1982

By its Memorandum and Order of February 19, 1982, this Licensing Board directed participants to submit their positions on particular questions contained in the Order. NFS hereby responds to the Board's direction to answer Question 10 and avails itself of the opportunity to state its views on Questions 7 and 8.

I

BACKGROUND

Pursuant to an application by the New York State Energy Research and Development Authority (NYSERDA), joined by the U.S. Department of Energy (DOE), on September 30, 1981, the NRC issued a license amendment, Change No. 31, to License CSF-1. Change No. 31 authorized NFS and NYSERDA, as their interests appeared, to transfer exclusive possession

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of the West Valley facility to DOE, subject to certain conditions, in order to implement the West Valley Demonstration Project Act. At that time NYSERDA and NFS were parties to 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 facility.

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 the Change could become mandatory if a court order forced NFS to vacate the West Valley facility. In that event, NFS would have been faced with undefined legal and economic consequences, since Change No. 31 did not provide for termination of NFS's responsibilities as an NRC licensee. NFS, therefore, filed with the NRC Commissioners a Motion to Postpone the Effectiveness of the License Amendment and a Request for Hearing.

By Order 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. NFS also filed a petition with the U.S. Court of Appeals for the District of Columbia Circuit questioning the

validity of Change No. 31 because of the manner in which it was issued.^{1/}

On October 16, 1981, NYSERDA obtained a partial summary judgment from the U.S. District Court for the Western District of New York requiring NFS to vacate the West Valley facility. This Order was subsequently stayed and later reversed by the U.S. Court of Appeals for the Second Circuit. In remanding the case, the Court directed the District Court to act promptly to resolve the litigation.

Under an order from the District Court to confer with a Magistrate regarding resolution of their differences, NYSERDA and NFS negotiated a procedural agreement, and drafted a Settlement Agreement, Stipulation, and Order (Settlement Order) to be submitted to the Court. As a part of their negotiated agreement, on February 1, 1982, NFS, joined by NYSERDA, submitted to the NRC an application to amend License No. CSF-1 to provide for termination of NFS' responsibilities as a licensee effective on the occurrence of 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

^{1/} This petition was withdrawn on February 11, 1982, after the parties had reached agreement on the terms of their Settlement Agreement.

in a settlement agreement and order.^{2/} On February 11, 1982, NRC issued Change No. 32, which provided that NFS's responsibilities and authority under the License would be terminated when the three conditions had been met.

In accordance with the procedures agreed to by NFS and NYSERDA pursuant to the terms of the draft Settlement Agreement, Stipulation, and Order, on February 11, 1982, NFS filed a request to dismiss the Circuit Court petition and notified this Board that NFS was withdrawing its Request for Hearing before the NRC. That Agreement and Order was approved by the District Court on February 19, 1982. By the terms of that Order, NFS was obligated, inter alia, to request the NRC "to dismiss the pending proceedings ... initiated by NFS relating to Change No. 31 to License No. CSF-1, without prejudice to the initiation of further proceedings if the Settlement Date does not occur within one year...."

By letter agreement dated February 18, 1982, NYSERDA and NFS agreed that NFS would transfer the West Valley facility to DOE as soon as DOE was ready to accept

^{2/} The proposed Settlement Agreement, Stipulation and Order provided that certain provisions would become effective and binding on the parties if, within one year from the date the Court approved the Agreement, or such additional period as the parties mutually agreed to, certain events had occurred; or NYSERDA elected to make the specified provisions effective.

possession, and, effective on such transfer, NYSERDA accepted surrender of the facility. DOE assumed exclusive possession of the West Valley facility on February 25, 1982.

II

RESPONSE TO QUESTION 10

QUESTION 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?

RESPONSE

As noted above, NFS's "Withdrawal of Request for Hearing" was filed pursuant to and in fulfillment of its good faith obligations under the procedures agreed to by NFS and NYSERDA, as reflected in the Settlement Agreement and Order of the District Court. Under the terms of that Order and NFS's agreements with NYSERDA, NFS accepted the conditions in Change No. 31 to license CSF-1. NFS has complied with NYSERDA's directive to transfer the facility

to DOE, and has vacated the premises. NFS's employees at the facility have been terminated and have accepted employment with DOE's contractor. At the present time NFS has no capability, and no authority, to conduct any NRC licensed activities at the West Valley facility. Although NFS remains an NRC licensee until such time as Change No. 32 becomes effective, the negotiations for and approval of the Settlement Agreement and Order by the District Court have resolved to NFS's satisfaction the concerns which prompted NFS to challenge Change No. 31 and to file its request for hearing.

The notice of withdrawal was addressed to this Board pursuant to the Commission's Order and the subsequent establishment of this Board by the Chairman of the ASLB. It is NFS's understanding that this Board is exercising the authority of the Commission in this matter, and a notice to the Board constitutes a notice to the Commission. NFS believes that no further action is required by the Commission or this Board other than to take note of the withdrawal and to dismiss NFS's Request for a Hearing.^{3/}

^{3/} 10 C.F.R. section 2.717 does not require further action by the Board nor does it provide the Board with authority to condition the terms of the withdrawal. By contrast, in other situations, NRC regulations clearly give licensing boards the authority to establish terms for the withdrawal of an application for a license after issuance of a notice of hearing. See, 10 C.F.R. section 2.107(a).

Continued

NFS believes there was nothing improper under the terms of 10 C.F.R. sec. 2.717 or any other NRC regulation in the withdrawal of its Request for Hearing. The adjudicatory process encourages settlement of disputes rather than taxing the regulatory system with needless proceedings. NFS was willing to--and did--transfer the facility to DOE subject to Change No. 31. Therefore, since NFS had no reason to continue this proceeding, it would have been improper for NFS not to have withdrawn its Request for Hearing.

With respect to the Board's question regarding the effect on Dr. Bross' request for hearing, the dismissal of the NFS Request for Hearing has no procedural effect on Dr. Bross' request. The Commission Order dated November 6, 1981 directed the Chairman of the ASLB to establish a Licensing Board to 1) conduct a hearing pursuant to NFS's request, and 2) review Dr. Bross' request for hearing. While NFS agrees with the NRC staff that Dr. Bross has failed to identify an issue within the jurisdiction of the Commission, and hence of this Board,

10 C.F.R. section 2.717(b) does provide that "[a]ny order related to the subject matter of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding." The Board seems to be concerned that the issuance of Change No. 32 may fall into that category and that amendment should therefore be considered by the Board. However, as discussed in NFS's response to Questions 7 and 8, Change No. 32 is not related to the subject matter of this proceeding and, even if it were, no modification of Change No. 32 could possibly have any impact on the purpose of this proceeding.

his request is before this Board as a matter separate and apart from NFS's Request for Hearing. Accordingly, dismissal of NFS's request will not affect the Board's jurisdiction to review the request by Dr. Bross.

III

RESPONSE TO QUESTIONS 7 AND 8

QUESTION 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.

QUESTION 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.

RESPONSE

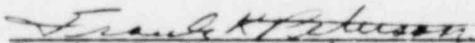
The potential issues before this Licensing Board relate only to the appropriateness of Change No. 31, which allowed the licensees to transfer possession of the West Valley facility to DOE, subject to certain conditions, in order to implement the West Valley Demonstration Project Act. NFS's objections to Change No. 31 were based on its concerns regarding potential legal and economic consequences to NFS if the transfer were to occur without NFS's approval. Those concerns now have been alleviated. Since transfer has already occurred, with the approval of NFS, NFS's objections are now moot.

Dr. Bross' concerns appear to be solely directed to DOE's ability to properly carry out the West Valley Demonstration Project. He objected to Change No. 31 simply because it allowed the project to start. Dr. Bross has not questioned the validity of Change No. 32.

Change No. 32 does not alter the circumstances which are the basis for Dr. Bross' objections to Change No. 31; i.e., DOE's ability to properly conduct the West Valley Demonstration Project, nor does Change No. 32 affect the issues sought to be litigated by Dr. Bross. Change No. 32 only identifies the conditions which NRC has established for termination of the NFS license.

Change No. 32 has no bearing on the issue of whether the West Valley facility could be validly transferred to DOE pursuant to Change No. 31. NRC gave permission for that transfer in Change No. 31, and the transfer has occurred. Change No. 32 in no way affects the validity of Change No. 31. Any modifications to Change No. 32 would have no effect on the status quo at the West Valley Facility. NFS therefore submits that no reason exists why Change No. 32 would be an issue before this Board.

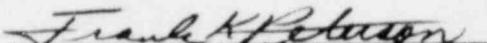
Respectfully submitted,



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Dated: March 8, 1982

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