UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Lawrence Brenner, Chairman
Dr. Jerry Harbour
Dr. Peter A. Morris

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

April 30, 1982

MEMORANDUM AND ORDER
RULING ON REQUESTS FOR HEARING
ON OPERATING LICENSE AMENDMENT

Appearances

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Nuclear Fuel Services, Inc.:

Orris S. Hiestand, Jr., George L. Edgar, Frank K. Peterson, Esquires, Morgan, Lewis & Bockius.

New York State Energy Research and Development Authority:

Carmine Clemente, Howard A. Jack, Esquires; Phillip H. Gitlen, Esquire, White, Osterman & Hanna.

Dr. Irwin D. J. Bross, pro se.

United States Department of Energy:

R. Tenney Johnson, Warren E. Bergholz, Jr., Gregory Fess, Esquires.

United States Nuclear Regulatory Commission Staff:

James R. Wolf, John F. Klucsik, Esquires.

The Board rules on the separate requests for hearing by Nuclear Fuel Services, Inc. (NFS) and Dr. Irwin D. J. Bross. The Board grants the withdrawal of its request for hearing by NFS, and finds that it lacks jurisdiction to consider the claims of Dr. Bross regarding the conduct by DOE of a radioactive waste management demonstration project.

Background

This proceeding relates to a license amendment (Change No. 31) issued by the NRC Staff on September 30, 1981,[1/] which was intended to permit the New York State Energy Research and Development Authority (NYSERDA) and Nuclear Fuel Services, Inc. (NFS) to transfer temporarily their respective interests in the Western New York Nuclear Service Center at West Valley, New York[2/] to the

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1/ 46 Fed. Reg. 49237 (October 6, 1981).

2/ The Western New York Nuclear Service Center, located about 30 miles south of Buffalo, was the earliest effort in commercial nuclear fuel reprocessing in the United States. NFS leased and operated the site, which was then owned by the New York State Atomic and Space Development Authority. NYSERDA is the successor to that agency's interests in the Center. H.R. No. 96-1100(I), 96th Cong., 2d Sess. 6 (June 12, 1980), reprinted in [1980] U.S. Code Cong. & Ad. News 6017, at 6020. NFS, however, owned those portions of the facility in which actual chemical processing was to occur. Provisional Operating License No. CSF-1, §2.

United States Department of Energy (DOE) in accordance with the West Valley Demonstration Project Act, Pub. L. No. 96-368, 94 Stat. 1347 (1980) (West Valley Act).[3/]

NFS, which was co-holder with NYSERDA of the license for the West Valley facility,[4/] opposed Change No. 31 as being detrimental to its legal and economic interests. NFS asserted that while the amendment deprived it of any rights which it may have had under its license to control activities at the Center during DOE's performance of the demonstration project at the site, it had not terminated its obligations or liabilities as a licensee for any danger or harm to the public health and safety which might arise during or as a result of DOE's activities at the West Valley site.[5/]

On October 6, 1981, NFS submitted an application for a further license amendment, which, if granted, would have terminated all of NFS's rights and responsibilities under the license upon DOE's assumption of exclusive possession and control of the facility.[6/]

[3/] The West Valley Act authorized the Department of Energy to carry out a high level radioactive waste management demonstration project at the Center, for the purpose of demonstrating solidification techniques which can be used for preparing high level radioactive waste for disposal. West Valley Act, supra, §2(a).

[4/] Provisional Operating License No. CSF-1, issued by the Atomic Energy Commission on April 19, 1966.

[5/] Letter from NFS President Ralph W. Deuster to Richard E. Cunningham, Director, Division of Fuel Cycle and Material Safety, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, dated September 11, 1981.

[6/] Notice of receipt of this proposed amendment was published at 46 Fed. Reg. 56086 (November 13, 1981).

As set out in the October 6, 1981 letter from NFS President Ralph W. Deuster to John G. Davis, Director of the U.S. NRC Office of Nuclear Material Safety and Safeguards, the proposed amendment provided for the termination of all NFS's rights and responsibilities under License No. CSF-1 upon DOE assuming exclusive possession and control of the facility.

Deuster further stated his understanding that NYSERDA was willing to join in this proposed amendment, provided that a settlement of NFS's and NYSERDA's contractual disputes was reached and signed simultaneously with the issuance of the proposed amendment.

Subsequently, on October 13, 1981, NFS filed with the Commission a request for hearing with respect to the conditions imposed by Change No. 31, asserting that the amendment had altered its rights and responsibilities under its license and had adversely affected its interests. Stating its concern that its transfer of the West Valley facility to DOE, as required by Change No. 31, would be in violation of Federal law, NFS sought to have the Commission determine both "NFS's rights and responsibilities under its license and NRC's authority to issue the amendment effectuating the transfer...."[7/]

At the same time, NFS moved that the Commission postpone the effectiveness of the license amendment, asserting that, as a licensee, it had an absolute right, pursuant to 10 CFR §2.204 (1981), to a prior hearing before the amendment could be made effective.

Through a letter to NRC Secretary Samuel J. Chilk dated October 16, 1981, Dr. Irwin D. J. Bross, Director of Biostatistics at Buffalo's Roswell Park Memorial Institute, also requested that the Commission hold a hearing with respect to Change No. 31. Dr. Bross stated his concern as a resident and a "health bureaucrat" that "misguided" DOE efforts to clean up the highly radioactive sludge contained in steel tanks at the West Valley site by "violent agitator action" could endanger the health and safety of residents of Western New York State. He further asserted that DOE is unable to police its own operations and that there would be no Federal protection of the public health and safety if NRC determines that, pursuant to the West Valley Act, it has no responsibility for supervising DOE cleanup operations.

In its November 6, 1981 Order and Notice of Hearing, CLI-81-29, 14 NRC 940 (1981), the Commission denied NFS's motion for a stay of the effectiveness of the license amendment. It further directed that the Chairman of the Atomic Safety

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7/ "Licensee's (NFS's) Request For Hearing," October 13, 1981, at 6.

and Licensing Board Panel establish a Licensing Board "to conduct an adjudicatory hearing in accordance with 10 CFR Part 2, Subpart G pursuant to the request of NFS and to review Dr. Bross' request for a hearing."[8/] By an order dated November 17, 1981, this Board was established for those purposes.

To aid the Board in understanding the relationship of this proceeding to collateral proceedings pending before both the Commission and the Federal Courts,[9/] and to clarify those issues on which a hearing had been requested, we directed, through our December 31, 1981 order, that the parties provide us with information in the form of responses to a series of Board questions.

[8/] 14 NRC at 943.

[9/] At the time, three connected matters were pending before the Federal Courts. The first was an action commenced by NFS on December 24, 1980 in the District Court for the Northern District of New York, seeking to enforce its asserted right to have NYSERDA accept its surrender of possession of the West Valley facility pursuant to their lease agreement.

The second action was commenced by NYSERDA in New York State Supreme Court in Cattaraugus County six days later, seeking to enjoin NFS from abandoning the low-level waste storage facilities at the Center (which were not to be transferred to DOE pursuant to the West Valley Act) and directing it to continue to maintain those facilities. The State court action was promptly removed to the U.S. District Court for the Western District of New York, and the Northern District case was subsequently transferred to the Western District.

On September 30, 1981, NYSERDA changed its position and moved for partial summary judgment to require NFS to vacate that portion of the Center which was to be occupied by DOE. The District Court granted this motion, holding that under New York law, NYSERDA has the right to repossess the Center upon the termination of its lease on December 31, 1980, and that no reasonable interpretation of this lease supported NFS's claim that NYSERDA was required to accept NFS's surrender of possession after that date. On December 8, 1981, the U.S. Court of Appeals for the Second Circuit reversed that decision and remanded the matter to the Western District for trial or settlement.

The third Federal proceeding involved a petition filed by NFS in the District of Columbia Circuit of the U.S. Court of Appeals seeking to vacate the Commission Order issuing Change No. 31 on September 30, 1981, to declare the amendment a nullity, and to remand the case to the NRC with directions requiring that NFS be granted an opportunity for a prior hearing before any amendment to its license would become effective.

On January 11, 1982, the NRC Staff denied NFS's October 6, 1981 license amendment application, without prejudice, stating that the Staff wished to abstain from deciding matters which were at that time the subject of litigation before the United States District Court for the Western District of New York.[10/]

Change No. 32

Subsequent to the Staff's denial of this license amendment application, however, we received letters dated February 4, 9, and 12, 1982 from NFS, NYSERDA, and the Staff, respectively, transmitting proposed and then issued Change No. 32. The effect of this license amendment was to terminate the authority and responsibility of NFS under the license, effective upon (1) NYSERDA's acceptance of NFS's surrender of the West Valley facility; (2) DOE's assumption of exclusive possession of the facility; and (3) settlement of those civil actions pending in the United States District Court for the Western District of New York.[11/]

Both NFS and Staff Counsel assert in their letters, using precisely the same language, that the Board was being provided with a copy of this license amendment merely "to keep the Board abreast of matters relating to license No. CSF-1" and that the "...amendment is not an issue before the Board."

NFS withdrew its October 13, 1981 request for a hearing on Change No. 31 the day before the Staff issued Change No. 32.[12/] On February 18, 1982, NFS

[10/] Letter from Richard E. Cunningham, Office of Nuclear Material Safety and Safeguards, U.S. NRC to Ralph W. Deuster, NFS, dated January 11, 1982.

[11/] See Notice of Issuance of Amendment to Facility License No. CSF-1, 47 Fed. Reg. 7352 (February 18, 1982).

[12/] On the same day (February 11, 1982) NFS also moved for voluntary dismissal of its Petition for Review of the Commission's September 30, 1981 order (issuing Change No. 31) before the U.S. Court of Appeals (D.C. Circuit). NFS's February 11, 1982 Withdrawal of Request for Hearing stated that "An additional amendment to that license, recently issued by the Nuclear Regulatory Commission, has removed NFS's objections to Change No. 31." NFS was apparently referring to Change No. 32 but seems to have beaten the NRC Staff to the punch.

and NYSERDA signed the settlement agreement referenced in Change No. 32 and the Court approved this agreement on the following day. DOE assumed exclusive possession and control of the West Valley facility[13/] in accordance with the terms of Change No. 31 on February 25, 1982, thus accomplishing all preconditions to the effectiveness of Change No. 32.

In our February 19, 1982 memorandum and order, we directed the participants to this proceeding to submit comments as to the effect of the issuance of Change No. 32 upon this proceeding, in addition to their responses to this Board's December 31, 1981 order. Among other matters, we specifically requested that the Staff and any other participant wishing to state its views explain why and to what extent Change No. 32 "is not an issue before this Board," noting that it "accords the very relief sought by NFS in this proceeding," and citing 10 CFR §2.717(b) (1981).

Pursuant to Section 2.717(b), the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, is specifically empowered to issue orders or to take any otherwise proper administrative action with respect to a licensee who is a party to a pending proceeding.

13/ While NFS surrendered the low-level radioactive waste burial ground to NYSERDA pursuant to their Settlement Agreement, it is not clear from those materials before this Board who, if anyone, is to be in possession and control of that area of the West Valley site during DOE's conduct of the demonstration project.

Although the matter is not squarely before us, since these license amendments relate only to high-level waste and ancillary facilities, the NRC Staff should ensure that the various transfers have not neglected the need that a qualified licensee be in possession and control of the low-level waste site and that appropriate license conditions be implemented with respect to that site, so as to reasonably assure the health and safety of the public.

The Commission may wish to obtain a status report from the Staff with respect to this matter. The Board respectfully suggests that the Commission do so.

The section specifically grants the presiding officer of a pending proceeding the power to modify, as appropriate for purposes of the proceeding, any order related to the proceeding's subject matter.[14/]

The Staff, in its March 8, 1982 filing, asserts that Change No. 32 is unrelated to the subject matter presented by NFS's hearing request. In its view, the issuance of Change No. 32 does not, "by itself," grant NFS the relief which it sought, resolve the factual or legal issues which NFS had sought to litigate with respect to Change No. 31, or deprive NFS of standing to seek a resolution before the Board of the issues raised in its request for hearing. It is unclear what meaning, if any, the Staff attached to the words "by itself".

In support of its argument, the Staff asserts that the circumstances of the transfer of the West Valley facility under Change No. 31 were not modified by the issuance of Change No. 32, hence, "...if NFS had decided to pursue its claims, and if the arguments of NFS were found to be meritorious, it would still be entitled to relief, notwithstanding issuance of Change No. 32."

[14/] In Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 229-230 (1979), a licensing board analyzed those situations when a board might modify an order or action of the Staff:

> ...On the one extreme, an activity may be so closely related to the subject matter of a proceeding, as in the Diablo Canyon proceeding [Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2, CLI-76-1, 3 NRC 73, 74, n. 1 (1976) (consideration of materials license authorizing delivery and storage of fuel assemblies held to be "integral" to licensing board's consideration of operating license)], that any Staff order may normally not be issued (or, if issued, must be stayed pending resolution to [sic] the contested issue). At the other extreme, a particular subject may be so far removed from a pending proceeding that its consideration is inappropriate -- such as the antitrust issues sought to be raised in the Marble Hill safety and environmental proceeding [Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1967)]. Finally, there are matters with respect to which independent Staff action is entirely appropriate but which bear enough relationship to the subject matter of a pending proceeding that review by the Licensing Board in that proceeding is appropriate.... (Emphasis in original.)

We disagree. The Staff's conclusion that the issues which NFS had sought to litigate were neither modified nor resolved by the issuance of Change No. 32 is incorrect.[15/] It is clear that the issuance of that license amendment effectively removed NFS's "standing" to assert its claims by granting it the relief sought in this proceeding.

In determining hearing and intervention rights under Section 189(a) of the Atomic Energy Act of 1954, 42 USC §2239, the Commission will apply judicial concepts of standing. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10," 11 NRC 438, 439 (1980). To have "standing" in a court, one must allege first an interest arguably within the zone of interests protected by the statute and second, an injury that has occurred or arguably would result from the action complained of. "Under this 'injury in fact' test, a mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing," Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976).

In this proceeding, the "injury in fact" asserted by NFS in its October 13, 1981 Request for Hearing is that Change No. 31 terminated its rights without termination of its responsibilities and thereby threatened its legal and economic interests. As NFS questioned the validity and effect of the license amendment under various Federal laws and NRC regulations, it sought a clarification of its

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15/ For example, the Staff asserts, at page 6 of its March 8, 1982 submission, that Change No. 32 "(d)oes not modify the continuing licensee obligation during the period when the facility is in the possession of DOE." While this statement appears true for NYSERDA, we believe that Change No. 32 plainly altered the licensee obligation of NFS during DOE's possession of the West Valley facility, as it terminated all of NFS's rights and responsibilities under the facility's license upon the happening of certain conditions.

rights and responsibilities from this Board. The effect of Change No. 32, however, was to terminate NFS's responsibility under Provisional Operating License No. CSF-1, upon the happening of certain conditions, including its signing of the Settlement Agreement with NYSERDA.

In our opinion, any need for us to consider NFS's claim that its responsibilities under its license should have been terminated after Change No. 31 was rendered moot by the termination of NFS's interests in the license by Change No. 32.

This also seems to be the conclusion of NFS, although stated by it, for reasons unclear to the Board, as an argument that Change No. 32 does not relate to the subject matter of this proceeding. At page 9 of its March 8, 1982 filing, NFS states that "(t)he potential issues before this Licensing Board relate only to the appropriateness of Change No. 31...." NFS goes on to state, however, that its concerns regarding potential legal and economic consequences "now have been alleviated" and that "(s)ince the transfer has already occurred,...NFS's objections are now moot." Similarly, as we observed above at n. 12, NFS's withdrawal of its hearing request itself stated that Change No. 32 "removed NFS's objections to Change No. 31."

In arguing that Change No. 32 does not accord NFS the very relief which it sought in this proceeding, the Staff acknowledges, at page 11 of its March 8, 1982 submission, that NFS had indicated in its October 13, 1981 letter to the Commission that it would withdraw its request for hearing if its October 6, 1981 application for a license amendment terminating the responsibility of NFS under its NRC license were granted. The Staff concludes, however, that this amendment was not the relief requested in this hearing, but a collateral matter addressed to the NRC Staff. It further concludes that the denial of this NFS application for a license amendment by the Staff on January 11, 1982 was dispositive of the matter in any event.

In this Board's opinion, however, it is clear that NFS saw both this adjudicatory hearing and the Staff's administrative license amendment process as merely two paths leading to the same objective i.e., termination of its responsibilities under its NRC license.

We read NFS's statement that it would withdraw its October 13, 1981 request for hearing if its October 6, 1981 license amendment application were granted as just one indication of NFS's intent to terminate its license responsibilities by any available legal course of action. For example, even after the Staff denied NFS's October 6, 1981 license amendment application on January 11, 1982, NFS appended this proposed license amendment to its January 22, 1982 response to our December 31, 1981 order, proposing, at 6, to have this Board consider the terms of this amendment "as a means of correcting the deficiencies and problems inherent with the September 30th amendment [Change No. 31]." As the terms of the license amendment granted by Staff on February 12, 1981 effectively grant NFS the same release from its rights and responsibilities under its NRC license as it had sought from this Board, we conclude that Change No. 32 is addressed to the same subject matter as this proceeding; and that it would thus be within our power, pursuant to 10 CFR §2.717(b), to modify that license amendment as we deem appropriate for purposes of this proceeding.

We do not deem such a modification to be necessary or appropriate in this proceeding, however. The differences between NFS and NYSERDA, which apparently existed long before the issuance of Change No. 31 and which apparently prompted NFS to originally oppose this license amendment, seem to have been resolved pursuant to the Settlement Agreement signed by these parties on February 18, 1982.

Additionally, the Commission's November 6, 1981 decision in this case held that a prior hearing is not required before DOE takes possession of the facility. Therefore, even though Change No. 32 does affect the subject matter of the NFS

request, it does not affect any rights of Dr. Bross. He would not be entitled to a hearing prior to the effectiveness of Change No. 31, even if he had requested such a prior hearing. (He did not.)

Furthermore, in light of our ruling, infra, below that the West Valley Act and other statutes preclude an NRC licensing board from adjudicating the conduct of DOE of the demonstration project, we conclude we are precluded from hearing Dr. Bross' claims under either Change No. 31 or 32.

Dr. Bross, in his letter to the Board of February 16, 1982, states that he requests a hearing on Change No. 32 because it clears the way for DOE to take possession of the facility to conduct the demonstration project. Dr. Bross reiterates in summary form his claims in connection with Change No. 31 that DOE's conduct of the project will cause hazards. Thus, the matter which Dr. Bross seeks to litigate would be the same under either Change No. 31 or 32. If we had found below that an NRC licensing board has jurisdiction to adjudicate Dr. Bross' claims regarding DOE's conduct, then we believe the Board would have been able to consider the effect of Change No. 32, if any, on Dr. Bross' claims pursuant to 10 CFR §2.717(b), based on our discussion above. Where Section 2.717(b) applies, there is no need for the Commission's Order and Notice of Hearing, which refers only to Change No. 31, to be explicitly expanded to refer to the subsequent Change No. 32 as a prerequisite to jurisdiction to consider that subsequent license amendment. See Diablo Canyon, supra, 3 NRC at 74, n. 1. Otherwise, the authority conferred by Section 2.717(b) would be severely limited and could be easily avoided by the form in which an amendment to a license is cast.

Hearing Request of NFS

On February 11, 1982, NFS filed a "Withdrawal of Request for Hearing" which, on its face, appeared to be addressed to the Commission.

In response to a question we posed in our February 19, 1982 order, NFS, in its March 8, 1982 filing, clarified that its Withdrawal was intended to be addressed to this Board.

We deem this Withdrawal, as clarified, to be a motion to dismiss this proceeding, insofar as it relates to those issues presented by the NFS request for hearing, and this motion is hereby granted.

Hearing Request of Dr. Irwin D. J. Bross

We turn our attention now to the hearing request of Dr. Bross, and the question of whether it is within this Board's jurisdiction under the November 6, 1981 order of the Commission and the West Valley Act to consider the public health and safety matters upon which he has requested a hearing and/or to grant the relief which he has requested.[16/]

At the outset, we note that while the Commission's November 6, 1981 Order specifically delegated the authority for a licensing board to "conduct an adjudicatory hearing" with respect to NFS's Request for Hearing, it empowered this Board only to "review" Dr. Bross' Request for Hearing.[17/] The Staff asserts in its March 8, 1981 Answer to our December 31, 1981 and February 19, 1982 orders (Staff's March 8, 1981 Answer), at 15, that this distinction should be read as limiting our jurisdiction to making a determination of whether a hearing should be granted with respect to Dr. Bross' request, while precluding us from

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16/ Dr. 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.

17/ 14 NRC at 943. See text accompanying n. 8, supra.

holding such a hearing even if we were to deem it necessary. While we believe that the Commission's intent in using this language is not altogether clear, we conclude that the Staff's interpretation of this language is possibly correct. Had this Board determined a hearing to be necessary pursuant to Dr. Bross' request, we might have sought confirmation of our authority to conduct it.

In the view of the Staff, however, those issues which Dr. Bross seeks to litigate in this proceeding are specifically removed from consideration by the Commission by virtue of the provisions of the West Valley Act, and are, hence, beyond the subject matter jurisdiction of this Board. In support of this conclusion, the Staff's November 27, 1981 Response to Request of Dr. Irwin D. J. Bross for Hearing, at 4-6, relies on several sections of the West Valley Act, particularly Section 2(c), and portions of that statute's legislative history which were asserted to demonstrate that there was "no doubt" that Congress did not intend that DOE's activities be subject to formal NRC licensing or regulation.

In our February 19, 1981 memorandum and order, at 4, n. 5, we observed that the attachment describing the Act's legislative history which the Staff had appended to its November 27, 1981 filing contained references to legislative history which appeared to be contrary to the Staff's position. We further noted that the identical attachment which the Staff provided to this Board had been submitted as part of an informational memorandum to the Commissioners by the NRC Office of General Counsel.[18/] This memorandum, which we appended to our February 19, 1982 order for use by the participants, concluded that it was "uncertain" whether Congress had intended that DOE be an NRC licensee.[19/]

[18/] SECY-81-24 (January 13, 1981).

[19/] Id., at 4.

Both our footnote and the accompanying text stated that the Board had not yet determined the permissible scope of its inquiry into DOE's conduct of the West Valley Demonstration Project, but was instead awaiting the pending submissions of the participants. No subsequent submission of any party attempted to explain the apparent inconsistencies in the Act's legislative history.[20/] The Board therefore deems that allowing the participants a further opportunity to brief this point is unwarranted.[21/]

NRC Jurisdiction Over DOE Under The West Valley Act

Congress itself has long struggled with the question of whether DOE should become an NRC licensee for purposes of the West Valley Demonstration Project prior to the enactment of the West Valley Act. A bill comparable to the West Valley Act had in fact passed both houses of Congress the year before this statute was enacted, but was never reported out of the conference committee due to what one Senator described as "jurisdictional uncertainties."[22/] Furthermore, an earlier version of the bill which eventually evolved into the West Valley Act had required that DOE and NYSERDA submit jointly an application for a license amendment, "if necessary,"[23/] apparently evincing an attempt to

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20/ The Staff's March 8, 1982 filing did not address the Commission's jurisdiction over DOE activities, other than to recite sections of the West Valley Act and to state that the basis for its position on the Commission's lack of jurisdiction is explained in its November 27, 1981 response to Dr. Bross' request for hearing.

NYSERDA states, in its February 16, 1982 answer to our December 31, 1981 order, that it concurs in the views expressed in Staff's November 27, 1981 pleading, but provides us with little analysis in support of that conclusion in either that answer or its March 8, 1982 filing.

21/ NYSERDA's February 16, 1982 answer, at 9-10, and Staff's March 8, 1981 pleading, at 18, each request three weeks to respond to any further opportunity given to Dr. Bross to brief this matter. We conclude that the parties have already been given sufficient opportunity to address this issue.

22/ See discussion of Senator Javits at 126 Cong. Rec. S6732 (June 12, 1980).

23/ See H.R. Rep. No. 96-1100 (I), 96th Cong., 2d Sess. 9 (June 18, 1980), reprinted in [1980] U.S. Code Cong. & Ad. News 6017, 6022.

leave to the NRC the question of whether, under existing law, DOE was required to become an NRC licensee. This provision was never approved by either house of Congress, however.

As initially passed by the Senate on June 12, 1980, the West Valley Act contained language identical to that finally enacted as Section 2(b)(4)(D) which provides for:

> (D) Submission jointly by the Department of Energy and the State of New York of an application for a licensing amendment as soon as possible with the Nuclear Regulatory Commission providing for the demonstration.

As reported by the House Committee on Interstate and Foreign Commerce on September 15, 1980, however, this language had been deleted in favor of a provision which became Section 2(b)(4)(B) of the Act:

> (B) The Secretary shall provide technical assistance in securing required license amendments.

The House passed this bill on the same day it was reported out of Committee, and then proposed an amendment to the Senate bill which substituted the language of the House-passed bill for that which the Senate had earlier approved.[24/]

On September 17, 1980, the Senate approved the substitution of the text of the House bill for that of its own bill, but made two additions to the House text: First, the requirement now contained in Section 2(b)(4)(D) that DOE join NYSERDA in applying for an NRC license amendment, which the House had rejected, was reinserted; second, a proviso was added to Section 2(c) of the Act requiring that NRC review and consultation with regards to the demonstration project be conducted "informally" and not include or require formal procedures or actions by the Commission pursuant to the Atomic Energy Act of 1954, as amended, 42 U.S.C §§2011, et seq., or the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §§5801, et seq.

[24/] 126 Cong. Rec. H8771 (September 15, 1980).

As passed by the Senate, Section 2(c) provided, in pertinent part:

> (c) Within one year from the date of the enactment of this Act, the Secretary shall enter into an agreement with the Commission to establish arrangements for review and consultation by the Commission with respect to the project: Provided, That review and consultation by the Commission pursuant to this subsection shall be conducted informally by the Commission and shall not include nor require formal procedures or actions by the Commission pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, or any other law....

The House passed this bill, as amended by the Senate, later that same day.

In support of its conclusion that DOE's conduct of the West Valley Demonstration Project is not a proper subject before this Board, the Staff's November 27, 1981 filing quotes from portions of the Congressional Record of September 15, 1980 in which Congressmen McCormack and Lundine conclude that the bill which they were debating on the floor on that date was not intended to make DOE an NRC licensee. The Staff also relies on that portion of Section 2(c) of the West Valley Act which mandates that review and consultation by the Commission be conducted "informally".

We note initially that the comments of Congressmen McCormack and Lundine quoted by Staff were made on September 15, 1981, prior to the Senate's re-insertion of the above-quoted language of Section 2(b)(4)(D) requiring that DOE and New York State submit "jointly" an application for an NRC license amendment. The September 15, 1980 report of the House Committee on Interstate and Foreign Commerce had specifically rejected this Senate-passed language, substituting the requirement that DOE provide New York State with "technical assistance" in applying for this license amendment. The Committee stated that it had made this change so as to avoid potential "legal consequences" extending beyond the scope of the program which it feared might be raised if DOE were required to become a co-applicant for the license amendment (which the Committee had

believed to be required by the language which is now Section 2(b)(4)(D)).[25/] The statements of these two Congressmen therefore do not necessarily reflect the proper interpretation of the provisions of the West Valley Act as finally enacted.

We further note that both of the comments quoted by the Staff were drawn from the statements of these Congressmen after they had been given permission to revise and extend their remarks.[26/] Therefore, these quotations do not necessarily reflect what was said on the House floor on that date, or the intent of Congress.

However, even though the subsequent reinsertion and final enactment of Section 2(b)(4)(D) undercuts the remarks of Congressmen Lundine and McCormack, the contemporaneous addition and final enactment of the apparently inconsistent proviso to Section 2(c) providing for informal review and consultation supports the view that Congress did not intend DOE to be an NRC licensee, at least not in the traditional sense of being subject to formal procedures such as hearings. There is language in the September 15, 1980 House Committee Report to the effect that the version of Section 2(c) before the Senate proviso was added was intended "to establish a mechanism for communication and not define the legal scope of the relationship" between DOE and NRC.[27/] We do not believe that interpretation of Section 2(c) to be controlling as to the Senate's intent in its subsequent addition to Section 2(c) of the above-quoted proviso precluding formal procedures or actions by the Commission pursuant to the Atomic Energy Act or the Energy Reorganization Act.

[25/] H.R. Rep. No. 96-1100 (II), 96th Cong. 2d. Sess. 16-17 (September 15, 1980), reprinted in [1980] U.S. Code Cong. & Ad News 6028, 6041-6042. (Hereinafter, "September 15, 1980 House Committee Report.")

[26/] 126 Cong. Rec. H8765 and H8766 (September 15, 1980).

[27/] September 15, 1980 House Committee Report at 22-23, reprinted in [1980] U.S. Code Cong. & Ad News at 6047.

Nor does the Congressional Record clarify the Senate's intentions. The summary of the legislative history of the West Valley Act which was annexed as an attachment to Staff's November 27, 1981 filing attempts to reconcile the Senate's September 17, 1980 adoption of both Section 2(b)(4)(D) and the proviso to Section 2(c) by reciting that Senator Jackson stated on the Senate floor that the requirement that the Secretary of DOE join New York in applying for a license amendment was intended to ensure protection of the Federal Government's interest as a supplier of 90 percent of the project's costs. It concludes from this statement that the Senate's reinstatement of this provision, when viewed with the Senate's characterization of the review and consultation procedures as informal, was not intended to make DOE an NRC licensee, but merely to protect the financial interests of the Federal Government.

The Board does not believe the Senate's purposes in its September 17, 1980 amendments to the House bill to be so clear. We observe that the sentence of Senator Jackson immediately preceding that which was noted refers to DOE as being "party" to the license amendment to be sought by New York State and specifically states that the provision being inserted is drawn from the earlier Senate-passed version of the bill.[28/] In our view, Senator Jackson's statement that this provision was being reinstated so as to protect the Federal Government's financial interest in the West Valley Project can also be read as supporting an interpretation that Section 2(b)(4)(D) requires that DOE become an NRC licensee; requiring that DOE become a co-licensee with NYSERDA would seem to afford the Federal

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28/ "...The Senate-passed version of S.2443 contained, under the provision for a cooperative agreement with the State of New York, a requirement that the Department of Energy be party to the licensing amendment which will be required in order to conduct the project. I believe that reinserting this provision will insure that the interests of the Federal Government, which will bear 90 percent of the project, will be protected...." 126 Cong. Rec. H12762 (September 17, 1980).

Government at least as much protection of its financial investment as it would the Staff's interpretation of this provision.[29/]

The congressional statement which came closest to reconciling the apparent inconsistencies in the provisions of the West Valley Act occurred during the debates on the floor of the House after the final Senate-passed version of the bill was returned for House approval. In a discussion of the Senate-passed amendment to subsection 2(c), Congressman Ottinger states his understanding of this amendment as meaning that "...formal procedures such as licensing procedures..." will not be required "...but it does not preclude the Commission from taking any action that otherwise would be authorized by law."[30/] No Congressperson challenged Mr. Ottinger's understanding of these amendments as meaning that DOE should not be subjected to formal licensing procedures.[31/]

29/ The House's comments on the Senate's addition of Section 2(b)(4)(D) do not clairfy how this provision was intended to be reconciled with the proviso added to Section 2(c). On the floor of the House, Congressman Lundine explained, in response to a question from Congressman Lujan, that the Senate-passed amendment to the bill requiring that DOE join NYSERDA in seeking a license amendment was intended to ensure DOE's agreement to the amendment, rather than allowing New York State to seek such an amendment alone. 126 Cong. Rec. H9052 (September 17, 1980).

In this Board's view, this statement is consistent with Senator Jackson's earlier remark that the provision was added to protect the Federal Government's financial investment in the demonstration project. Similarly, we conclude it is not dispositive as to whether Congress intended DOE to be an NRC licensee. We note, however, that on the House floor, Congressman Lundine identified the language of this provision to be identical to that which the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce had previously eliminated from the bill, having concluded that it would require that DOE become an NRC licensee. See n. 25, supra, and accompanying text.

30/ 126 Cong. Rec. H9053 (September 17, 1980).

31/ Congressman Dingell, in his extended remarks, concluded that the House's adoption of the Senate amendments makes DOE an NRC licensee. Id. The weight which should be given to these extended remarks not necessarily made in the course of on-the-floor debate is unclear.

In this Board's opinion, Congressman Ottinger's interpretation of Section 2(c) is the only way in which this section can be read consistently with the other provisions of the West Valley Act. We therefore need not resolve whether Congress intended DOE to be an NRC licensee; whether or not Congress intended DOE to be nominally an NRC licensee, its relationship with NRC during the conduct of the West Valley Demonstration Project is to be conducted informally, including any licensing proceedings under the Atomic Energy Act or the Energy Reorganization Act.[32/] We therefore conclude that the West Valley Act, particularly the clear language of Section 2(c), the meaning of which is not controverted by the legislative history analyzed above, precludes a formal hearing with respect to DOE's conduct of the project itself.[33/] Because we conclude that this Board lacks subject matter jurisdiction over this matter, we rule that Dr. Bross' hearing request must be denied.

32/ What other NRC actions might be "otherwise authorized by law" during DOE's conduct of the demonstration project are not clear to this Board.

While Section 5(a) of the West Valley Act states that "...Nothing in this Act shall be construed as affecting any applicable licensing requirement of the Atomic Energy Act of 1954 or the Energy Reorganization Act of 1974...", Section 202 of the Energy Reorganization Act, 42 U.S.C §5842, specifically limits NRC jurisdiction over DOE-operated high-level radioactive waste storage facilities to those which will be operated on a "long-term" basis.

The legislative history of that Act defines "long-term" as meaning "tens of hundreds of years," and specifically excluded short-term research and development activities. S. Rep. No. 93-707, 93d Cong., 1st Sess. (December 7, 1973), reprinted in [1974] U.S. Code Cong. & Ad. News at 5521. While the West Valley Project is to last "at least 15 years" [H.R. No. 97-273, 97th Cong., 1st Sess. at 18 (October 15, 1981)], it is not a "long-term storage facility" within the meaning of that Act.

33/ We concur with Staff's position in its March 8, 1982 filing at 17, however, that pursuant to Section 2(a)(5) of the West Valley Act, DOE's conduct of the subsequent decontamination and decommissioning of the West Valley facility may be subject to full NRC regulation and licensing requirements.

It is therefore

ORDERED that the request of NFS to withdraw its October 13, 1981 request for hearing is granted; and it is

ORDERED that Dr. Irwin D. J. Bross' October 16, 1981 request for hearing on Change No. 31 is hereby denied. In the light of our ruling above that Change No. 32 is addressed to the same subject matter as Change No. 31, Dr. Bross' February 16, 1982 request for hearing on Change No. 32 is also denied.

Pursuant to 10 CFR §2.714a, Dr. Bross is advised that this order wholly denying his request for a hearing may be appealed on the question of whether his hearing request should have been granted in whole or in part by the filing (placing in the first class mail) of a Notice of Appeal and Supporting Brief with the Atomic Safety and Licensing Appeal Board within ten days after service of this order (with the allowance of five additional days for time taken by mailing of the order).

THE ATOMIC SAFETY AND LICENSING BOARD

Lawrence Brenner, Chairman
Lawrence Brenner
ADMINISTRATIVE JUDGE

Jerry Harbour, Member
Dr. Jerry Harbour
ADMINISTRATIVE JUDGE

for/ Lawrence Brenner, Member
Dr. Peter A. Morris
ADMINISTRATIVE JUDGE

Dated this 30th day of April, 1982
Bethesda, Maryland.